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1097
No. 2968

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DEXTER HORTON TRUST &
SAVINGS BANK,

Appellant,

vs.

THE COUNTY OF CLEARWATER
of the State of Idaho, and OREN D.
CROCKETT, as Terasurer of said
County,

Appellees.

No. 2968.

Upon Appeal from the United States District Coart, District of
Idaho, Central Division.

BRIEF OF APPELLANT

PETERS & POWELL,
546 New York Block, Seattle, Wash.,
GEORGE W. TANNAHILL,
Lewiston, Idaho,

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The Ivy Press, Third and Columbia, Seattle

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STATEMENT OF THE CASE.

This action was brought in the District Court of the United States for the District of Idaho by Dexter Horton Trust & Savings Bank, a corporation of the State of Washington, against the County of Clearwater, State of Idaho, and its Treasurer, Oren D. Crockett, a resident and citizen of that State, to obtain an injunction. The District Court,

after a final hearing upon the merits, entered a judgment dismissing the action. From which judgment Dexter Horton Trust & Savings Bank prosecutes this appeal.

In the year 1914 the defendant county issued to M. G. Nease, then and at all times since a resident and citizen of Oregon, its warrants aggregating the amount of \$44,072.69. On the 7th day of July, 1915, Dexter Horton Trust & Savings Bank purchased these warrants from Nease, paying therefor the sum of \$45,594.34. (Record p. 220.) The amount paid was principal and accrued interest less one-half of one per cent. (Record p. 222.) After the purchase of the warrants by the appellant a change in the personnel of the county officers was effected by a general election, and the county, through its new officers, refused to recognize the warrants as valid obligations of the county. (See Par. 31 of defendants' answer; Record p. 43.) This action was then brought by the appellant to restrain the defendants from dissipating to other purposes the funds of the county which were, by law, applicable to the payment of appellant's warrants.

The facts out of which the controversy arose, the questions involved, and the manner in which they are raised are, briefly, as follows:

There is a very large amount of timber lands in Clearwater County. On the 24th of February, 1914, the defendant county entered into a certain contract with M. G. Nease to cruise the timber in two townships, but this contract was, by mutual consent, rescinded. (Record pp. 479, 480.) On April 15, 1914, the defendant county entered into a contract in writing with the said M. G. Nease, whereby Nease agreed to

“make and cause to be made a careful, complete and thorough cruise and estimate of all the timber on the patented lands situated in Clearwater County, Idaho,”

with certain exceptions.

This contract was made for the purpose of supplying to the county the information necessary to enable the assessing officers of the county adequately and properly to assess, for taxation, such lands. The proceedings of the board of county commissioners of defendant county in authorizing and making the contract and a copy of the contract are found at pages 479 to 494 of the printed record. As frequent reference will be made to the various terms of the contract we herewith set it out in full, omitting formal parts and signatures:

That for the consideration hereinafter provided, to be made and paid to the second party (Nease) by the first party (Clearwater County),

the second party hereby covenants, contracts and agrees:

1.

That he will make and cause to be made a careful, complete and thorough cruise and estimate of all the timber on the patented lands situated in Clearwater county, Idaho, said cruise to be completed on or before the 15th day of June, 1915; excepting such of said lands as the first party may from time to time withdraw from this contract, that is to say there are certain lands in Clearwater county of which the assessor knows the true cash value without the necessity of having a cruise thereon, and the first party shall have the right to withdraw such lands from time to time prior to the cruising of same, and the lands so withdrawn shall not be cruised.

2.

That upon said cruise being made from time to time, the second party agrees to make reports of said cruise, said reports to contain topographic sketches showing the elevation of lands above sea level, taken by means of Aneroid barometers, said reports to show all openings, burns, marshes, rivers, lakes, creeks, trails, roads, waterfalls, valuable stone, mineral out-croppings and all other topographic features observed by the cruisers, said reports and sketches to show a general description of the character of the lands cruised, describing its adaptability for agriculture, grazing or other purposes after the timber is removed, said reports to describe the character of the different varieties of timber, giving the average stump diameter, the average number of 16 foot logs per tree, the percentage of surface clear timber, said reports to describe logging conditions, showing distance to outlet such as railroads or

driving streams; said reports to show damage by fire or otherwise, and the probability of fire; and will furnish all blue prints, blanks and binders for reports at his own expense, and all reports herein agreed to be furnished to said first party shall be upon such quality of paper and of the size and form and contain all the data above provided accordingly as shall meet the approval of said first party.

3.

That in making said cruise the second party shall use as a basis in estimating saw timber all trees having not less than a 12 inch stump diameter to an 8 inch top and as a basis in estimating cedar poles all cedar trees not included as saw timber which have a top diameter of not less than six inches 25 feet above the stump, all fir and tamarack which shall not be classed as saw timber shall be designated and counted as ties, and for this purpose a tie shall be considered as being eight feet long and of standard dimensions.

4.

The second party shall also as a part of this contract furnish and file with the Board of County Commissioners of Clearwater county, a bond with surety to the satisfaction and approval of the first party in the sum of Ten Thousand dollars, which shall provide that the second party shall faithfully perform all the terms and conditions of this contract on his part to be done and performed, which bond shall continue and be in force and effect from the 15th day of April, 1914, up to and until the 1st day of October, 1915, and no money shall be paid to the second party under the terms of this contract until such bond shall be filed and approved by the said first party.

5.

In consideration of the true and faithful performance by the second party of the terms and conditions of this contract on his part required to be done and performed, the first party agrees to pay to said second party or to his order or assigns, a sum equal to twelve and one-half ($12\frac{1}{2}$) cents per acre, for all lands cruised and reported on by said second party, accordingly as aforesaid, which shall be accepted and approved by the first party as follows, that is to say:

That at each regular term of the Board of County Commissioners or at a special meeting called for this purpose by said Board of County Commissioners of said county during the life of this contract, said Board of County Commissioners shall examine, accept or reject all reports filed by the second party prior to said meeting and shall,

Then give to the second party or to his order or assigns, an acceptance or rejection in writing, as the case may be, of the said reports, and all acceptance shall state and specify the amount due the second party for said work; and shall at each meeting above provided, order to be issued to the second party or his order or assigns, county warrants drawn on the current expense fund for an amount equal to 80% of the amount due the second party as shown by the accepted reports, the remaining 20% shall be paid to the second party or his order or assigns within 60 days after the completion of the contract and the acceptance of the work.

6.

It is further agreed by and between the parties hereto, that in case any cruise made by the second party as shown by his said reports shall be disputed and the owner of the timber so cruised desires to

have the same recruised, and the board of county commissioners of Clearwater County shall make demand therefor, that both parties to this contract shall select some competent cruiser satisfactory to both parties, and the cruiser so selected shall go over and cruise the tract or tracts in dispute, and the cruise of the party so selected shall be taken as final. If the cruise of the party so selected as arbitrator varies more than 20% above or below the cruise of the second party, then the compensation of said arbitrator and expense of said recruise shall be paid by the said second party, but in case the cruise of the arbitrator shall not be more than 20% above or below the cruise of the second party, then the compensation of said arbitrator and expense of said recruise shall not be paid by the second party.

7.

It is further stipulated and agreed, that all cruises that shall be rejected by the first party shall be corrected and the proper report and correct cruise of the land included therein shall be made by the second party accordingly as directed by the first party, and if the second party fails so to do, the first party shall have the right to cause the same to be cruised and the reports accordingly as hereinbefore agreed to be made, and the cost and expense thereof above twelve and one-half cents per acre shall be paid by the second party to the first party on demand, and the payment thereof shall be secured by the bond filed herewith.

8.

The second party hereby agrees that he will not sub-contract any part of the work to be done under the terms of this contract.

Nease was required by paragraph 4 of the contract to furnish, and did furnish, a bond in the

sum of \$10,000, conditioned for the faithful performance of the contract. (Record pp. 493, 494.)

Nease, from time to time as the work progressed, filed reports accompanied by verified claims for the amount due him under the terms of the contract for the work done as shown by the reports. These were accepted by the board of county commissioners of the defendant county, and the claims were allowed for 80%, according to paragraph 5 of the contract; and, after the completion of the work, the board duly allowed the balance of 20% due under the contract. (Record pp. 223, 224, 225; Pl. Ex. 4, 5, 6, 7, 8, shown at pp. 495 to 551 of the printed record.) Warrants were issued to Nease in the aggregate amount of the claims allowed, and a portion of the warrants so issued amounting to \$18,926.99 with accrued interest, were sold by Nease to the Empire National Bank of Lewiston, Idaho, and were paid by the defendant county. (See par. 27 of the affirmative answer, Record p. 40, Testimony of Nease pp. 332, 344.)

The laws of Idaho create in the treasury of each county a fund known as the warrant redemption fund, out of which the treasurer is required to pay warrants which have been issued and presented for payment, but not paid for want of funds.

The statute also requires the treasurer, when warrants are presented which cannot be paid for lack of funds, to stamp the same "Not paid for want of funds," with the date of presentation, and to register the same. Thereafter such warrants are required to be paid by the treasurer out of the warrant redemption fund in the order of their previous registration.

The warrants which the appellant purchased and which are in controversy here had been, prior to their purchase by the appellant, duly presented, stamped "Not paid for want of funds," and duly registered. (Record p. 221.) After the purchase of the warrants, the appellant discovered that two of them, numbered 7633 and 7638, respectively, had been improperly stamped in that the date of the registration stamp had been omitted. The appellant returned these two warrants to the treasurer of Clearwater county with the request that the treasurer supply the omitted date and that the warrants be returned to the appellant, which was done. (Record p. 221.) At the time appellant purchased the warrants, it had no notice of any claim of the county against their validity, and first learned of defendant county's objections to them in September or October, 1915. (Record pp. 221-222.)

The defendant treasurer threatened to pay out the funds in the warrant redemption fund in the payment of warrants registered subsequent to appellant's warrants. The appellant thereupon brought this suit to restrain the threatened unlawful diversion of the funds by the treasurer, and made the county itself, as well as the treasurer, a party defendant.

The bill of complaint sets out the issuance of warrants to Nease, their presentation and registration; that the same are payable out of the warrant redemption fund of the defendant county in the order of their registration; that the treasurer is threatening and declaring that he will pay out of said fund outstanding warrants registered subsequently to the registration of those of the appellant which will deplete the fund so as to leave no funds for the payment of appellant's warrants; and praying for an injunction restraining the defendants from paying out of said warrant redemption fund any warrants registered subsequent to any of appellant's warrants while any of appellant's warrants remain unpaid, and requiring defendant treasurer to call and pay warrants out of said funds in the order of their registration and not otherwise, and for general relief. (Record pp. 7 to 17.)

The defendants, by their answer, and amendments to the answer, deny that the board of county commissioners had any authority to issue any of the warrants upon which appellant based its action, and deny that the defendant county was indebted to M. G. Nease in any sum whatever represented by the warrants, and deny the validity of the warrants and their registration. The answer admits that the defendant treasurer threatens to pay out the funds in the warrant redemption fund in the payment of warrants registered subsequent to appellant's warrants. (Par. 13 of the Answer; Record p. 23.) The answer also sets up the following matter in substance:

1. That the warrants were issued to Nease for cruising done under the above mentioned contract, and that the board of county commissioners made no provision in the tax levy of that year for the payment of the indebtedness incurred thereby; that such indebtedness was not a necessary and ordinary expense and therefore void under Section 3 of Article 8 of the Constitution of Idaho. (Par. 24, 25, 26 of the Answer; Record p. 39.)

2. That the cruising was contracted for and made for the purpose of furnishing a basis for the valuation of lands for assessment purposes and was not made by the assessor or his deputy who alone, it was alleged, under the laws of Idaho, could

lawfully be authorized to do such work; that therefore the county commissioners had no power to contract with Nease to do the work. (See Par. 22-23 of Answer; Record pp. 37-38.)

3. That the contract was entered into fraudulently and collusively by the county commissioners and Nease. (See amendment to the Answer, Par. 1 and 2; Record pp. 150 to 152.)

4. That the work of Nease was improperly done, and of no value to the county. (See Par. 18 to 21, inclusive, of the Answer; Record pp. 34 to 37.)

5. That there was allowed to Nease, and included in the amount for which warrants were issued, compensation for cruising a certain amount of unpatented lands belonging to the United States, and a certain amount of lands belonging to the State of Idaho and also untimbered lands. (Par. 30 of the Answer; Record p. 42.)

6. That the bills which Nease filed with the board of county commissioners for work done under the contract and for which the warrants were issued were fraudulently allowed. (See Par. 4 and 6 of Amendment to the Answer; Record pp. 151-152.)

7. That the contract was improvidently entered into and at an excessive price. (See Par. 12 of the Answer; Record p. 31.)

8. That the treasurer is not bound to pay the warrants because no list of the claims allowed by the board of county commissioners, and for which the warrants were issued, was certified to the treasurer by the county commissioners, as required by the laws of Idaho. (Amendment to the Answer, Par. 1; Record p. 154.)

9. That the warrants are void because they do not specify the liability for which they were drawn, and when such liability accrued as required by the laws of Idaho. (Amendment to the Answer, Par. 2; Record p. 154.)

The answer concludes with a prayer that:

- (a) Plaintiff's bill be dismissed.
- (b) The contract between Nease and defendant county be decreed to be illegal and void.
- (c) The warrants be declared illegal and void.
- (d) The warrants be delivered up for cancellation.
- (e) The county be decreed not to be liable for any indebtedness for and on account of said warrants.
- (f) That the defendants have such other relief as to the court may seem proper. (Record pp. 43-44.)

The appellant, conceiving that the answer, since

it demanded affirmative relief, was in effect a counter claim, within the meaning of Equity Rule No. 31, filed a reply and filed an amended and supplemental reply at the trial. By its reply appellant admits the making of the contract between the defendant county and Nease which is pleaded in Par. 10 of defendants' answer. (Record p. 29.) The reply also admits that the warrants in question were issued for work done by Nease under that contract. (See Reply, Par. 5; Record p. 156; Par. 23, Record p. 167.)

At the trial, however, the appellant admitted that all of the affirmative matter of the answer not denied in the reply should be considered as admitted by the appellant, and that the allegations in Par. 26 of the answer should be considered as admitted. The result of this admission by the appellant is that it admits that no provision was made to meet the debt incurred under the Nease contract in the tax levy of that year. It is also admitted by the appellant that the indebtedness was not authorized by a vote of the electors of the county. (Record pp. 218-219.) The appellant, however, contends that the indebtedness is a necessary and ordinary expense within the meaning of Section 3 of Article 8 of the Constitution of Idaho.

A trial was had before the court without a jury, commencing on the 8th day of May, 1916, and succeeding days. (Record p. 217.) Upon the conclusion of the evidence the court took the case under advisement and, on the 29th day of July, 1916, rendered an opinion in writing holding, in substance, that:

- (a) There was no fraud in the making of the contract.
- (b) There was no fraud practiced on the board of county commissioners in procuring the allowance of the claims for which the warrants were issued.
- (c) That the warrants were invalid for the following reasons:
 - 1. The county commissioners had no power to contract with Nease to cruise the timber lands of the county for assessment purposes because such work could legally be done only by the county assessor or his deputies.
 - 2. That the action of the board of county commissioners in letting the contract was in violation of Sec. 3 of Art. 8 of the Constitution of Idaho in that the

expense incurred thereby was in excess of the revenues provided for the year in which it was incurred, and was not authorized by a vote of the electors of the county, and was not an ordinary and necessary expense within the meaning of the above section of the Constitution. (Record pp. 173 to 208.)

On the 11th day of September, 1916, the court entered a decree dismissing the action. (Record p. 209.)

This decree (omitting formal parts) was as follows:

“This cause came on to be heard at Moscow, in Latah County, State of Idaho, on the 8th day of May, 1916, and evidence was introduced, both oral and documentary, and the cause was argued by counsel for the respective parties and taken under advisement.

“And thereupon, upon consideration thereof, it was ordered, adjudged and decreed that plaintiff’s bill be and the same is hereby dismissed and that defendants recover their costs herein in the sum of \$535.60.

“Done this 11th day of September, 1916.”

From this decree Dexter Horton Trust & Savings Bank prosecutes this appeal.

SPECIFICATIONS OF ERRORS RELIED UPON.

The District Court erred and its decree was erroneous in the following particulars:

I.

Because the court erred in adjudging and decreeing that the bill of plaintiff be dismissed, and that the defendants recover their costs of the plaintiff, for the reasons more particularly set forth in the specifications following. (This is assignment of error No. XVI, shown at p. 784 of Record.)

II.

Because the court erred in failing and refusing to enter a decree adjudging that each of the warrants described in the plaintiff's bill of complaint was a valid obligation of the defendant Clearwater County for the amount for which the same was drawn with interest. (This is assignment of error No. XX, shown at p. 785 of Record.)

And the court erred and the decree is erroneous in this regard particularly for the following reasons:

1. Because the fact that, under the contract between Nease and the defendant, the cruising was to be done by persons other than the assessor or his

deputies did not render the contract invalid.

2. Because neither said contract, nor the issuance to Nease for work done thereunder of the warrants in suit was violative of Section three of Article eight of the Constitution of Idaho.

3. Because said warrants are in the form required by the laws of Idaho.

4. Because the contract was performed by Nease, his work accepted by the defendant county, and his claims therefor duly allowed by the Board of Commissioners of the defendant county which is bound thereby.

5. Because there was no fraud in the making of the contract, and the same was in all respects the valid contract of the defendant county.

III.

Because the court erred in failing and refusing to enter a decree adjudging that the claims of M. G. Nease, allowed by the board of county commissioners of Clearwater county for work performed and materials furnished by M. G. Nease to the said county under the contract in writing between said M. G. Nease and said Clearwater county, dated April 15, 1914, were each and all valid debts against

said Clearwater county. (This is assignment of error No. XXII, shown at p. 786 of Record.)

IV.

Because the court erred in failing and refusing to enter a decree adjudging that the defendant Clearwater county was indebted to the plaintiff in the sum of forty-nine thousand five hundred sixty-one and 99/100 dollars for and on account of the labor and material furnished to the said county by M. G. Nease in the performance of the contract between the said Nease and the said county, dated April 15, 1914. (This is assignment of error No. XXI, shown at p. 785 of Record.)

V.

Because the court erred in failing and refusing to enter a decree for the plaintiff and against the defendant county for the sum of forty-nine thousand five hundred sixty-one and 99/100 dollars, being the amount, principal and interest, due at the date of the entry of the decree, to the plaintiff from the defendant county for and on account of said warrants. (This is assignment of error No. XIX, shown at p. 785 of Record.)

The appellant specifies and relies upon the fol-

lowing errors committed by the court in the admission of evidence:

VI.

Because the court erred in failing and refusing to adjudge and decree that the said defendants, and especially said defendant treasurer, be required to call and pay out of the warrant redemption fund of the defendant Clearwater county all of the outstanding warrants of said county held by the plaintiff and described in its bill of complaint in the order in which the same were in point of time registered by the said treasurer. (This is assignment of error No. XVIII, shown at p. 785 of Record.)

VII.

Because the court erred in failing and refusing to adjudge and decree that the said defendants, and especially said defendant treasurer, Oren D. Crockett, as treasurer of the defendant county, be restrained and enjoined from paying out of the warrant redemption fund of the said county any warrants drawn by said county and payable out of said fund while there should remain outstanding and unpaid any of plaintiff's warrants of prior registry and described in the bill of complaint. (This is covered by assignment of error No. XVII, shown at p. 784 Record.)

VIII.

Because the court overruled the objection of the plaintiff to the reading from the deposition of the witness Charles Portfors, a witness for the defendants, of the answer to the question propounded to the deponent by defendant's counsel. The witness had testified that he was a timber cruiser and that his method of cruising was to double run; that is, to pass through each forty acres twice in making his cruise. Thereupon the following questions propounded to the witness by counsel for the defendants was read:

“Have you usually made any exceptions?
If so, why and under what circumstances?”

Thereupon the plaintiff by its counsel objected to this question and to the witness' answer to the same being read upon the following grounds:

(a) That the purpose of the testimony sought to be elicited from the witness and also by subsequent questions was to show that the work done by the cruisers who were in the employ of M. G. Nease was not properly done and to examine into the question as to whether Nease had properly performed his contract in doing the work which he was required to do thereunder and to show that the work done by Nease in the performance of his contract had not in the

opinion of the witness been done in a correct manner.

(b) That the board of county commissioners of Clearwater County was under the law charged with the duty and power of accepting or rejecting the work done by Nease and that, having accepted the same after the performance by Nease, the county is bound by such acceptance, which closes all inquiry into the question of whether the contract had been properly performed or not, in the absence of a showing that the commissioners had been induced to make such acceptance by some fraud or deceit practiced upon them in the matter of acceptance.

Thereupon the court ruled that the defendants would be permitted to show if they could that the work of the contractor Nease was so improperly done that no honest man would accept it for the reason that such facts if proven might reflect upon the motive of the parties to the contract in the letting of the same. Thereupon the deponent's answer to the question was read and was to the effect that he had run through forty-acre tracts occasionally four times when he thought it necessary and occasionally made single runs. That he made single runs in burnt tracts when there was not

enough timber to justify buying it, but not in green timber. And continuing the deponent Portfors further stated that four forty-acre tracts per day is a good average for a cruiser's work; that a cruise arrived at by passing once through each forty-acre tract would not have any value for assessment purposes because a man could not see the timber and get an average on a single run.

This ruling of the court was error.

This appears in the record as assignment of error No. III. (Record p. 767.) The evidence offered and appellant's objections thereto, and the ruling of the court appear at pages 233, 234, 235 of the printed record.

IX.

Because the court erred in admitting in evidence Defendants' Exhibit Three under the following circumstances:

Defendants' Exhibit Three was identified by the witness M. G. Nease as the report of one Archie Young of his cruise on section four, township 39 north, range three east. This report was made by Archie Young to M. G. Nease and is dated April 25 and 26, 1914, and there is the following notation in the margin of this report: "These two forties were

actually cruised, balance done in camp.” When this document was offered in evidence by the defendants’ counsel, plaintiff objected to its being received in evidence on the ground that the court could not in this case examine into the correctness of the work done by Nease and that all questions in regard to the sufficiency of the performance of the work had been concluded by the acceptance of the work by the defendant county and that the evidence offered did not in any manner tend to substantiate any of the allegations of the answer of collusion or fraud.

The plaintiff by its counsel requested that it be understood that this objection be taken and considered as made to all evidence that should be offered for a like purpose.

Thereupon the court made the following ruling:

The Court: “Of course, gentlemen, it ought to be understood at this time that if you are going into this matter at all you will have to take it up in such a way as to make it a circumstance tending to show a fraudulent agreement or understanding between this witness and the board of county commissioners. We can’t be drawn into an inquiry at this time as to the correctness of the work itself. In other words, we are not going to sit here as a board of county commissioners would sit for the purpose of determining whether or not the warrants should have been drawn or the bills allowed, unless you go

further and show that there was a fraudulent understanding or collusive arrangement between this witness and the board of commissioners, pursuant to which the board went through the form of allowing his claims without examining into them, and they both understood that the work would not be properly done.”

Counsel for defendants then stated to the court that they would later connect up the evidence offered and that it was submitted for the purpose of showing fraud and collusion, because if that kind of work was passed by the commissioners that would tend to show such fraud and collusion.

The plaintiff by its counsel then made further objection to said report being received in evidence on the ground that there was no proof before the court as to who had made the annotation in the margin thereof. Thereupon the court made the following ruling:

“The objection is overruled provided it will be connected up in that way as suggested by counsel.”

Thereupon the document was received in evidence and marked Defendants’ Exhibit Three. This evidence was never connected in the manner suggested by counsel for the defendants, or at all.

This ruling of the court was error.

This appears as assignment of error No. IV at page 769 of the Record.

Defendants' Exhibit 3 is not printed in the record but the original has been sent up to this court under order of the District Court. (Record p. 789.)

The offer of the evidence, appellant's objections thereto, and the ruling of the court appear at pages 244, 245 and 246 of the printed record.

X.

Because the court erred in admitting in evidence Defendants' Exhibit Four. This was a tabulated statement offered in evidence by the defendants showing the amount of timber, poles and ties, found by one Roy Wherry and one John Swanson in the cruise made by them for the defendant county in the months of March, April and May, 1916, as compared with the amount of the cruise of M. G. Nease for the defendant county of the same lands, to-wit:

The Southwest of the Northwest, and the Northwest of the Southwest of Section 27, and the Northeast Quarter, the West half of the Southeast Quarter, and the Southeast quarter of the Southeast quarter of Section 34, all in Township 35 North Range 5 E. B.

M. Also the South half of Section 13, all of Section 24, the North half of the Southeast quarter, and the North half of the Southwest quarter of Section 25, the East half of the Northeast quarter, the Northwest quarter of the Northeast quarter, the West half of the Northwest quarter, the Southeast quarter of the Northwest quarter, and all of the South half of Section 26; the Southeast quarter of the Southwest quarter, and the Southwest quarter of the Southeast quarter of Section 33; the North half of the Northwest quarter of Section 34; the North half of the Northwest quarter, and the Southwest quarter of the Northwest quarter, and the West half of the Southwest quarter of Section 35, all in Township 37 north, Range Five E. B. M. The East half of the Southwest quarter, and all of the Southeast quarter of Section 2; the Northeast quarter, the East half of the Northwest quarter, the East half of the Southwest quarter, and all of the Southeast quarter of Section 11. The West half, and the East half of the Northeast quarter, and the Northeast quarter of the Southeast quarter of Section 14. The Northeast quarter, the West half of the Northwest quarter, the West half of the Southwest quarter, and the Southeast quarter of Section 24. The Northeast quarter, the West half of the West half, and all of the Southeast quarter

of Section 25, all in Township 39 North, Range 5 E. B. M.

This statement shows the difference between the amount of each variety of timber found upon each forty-acre tract covered by the statement by Wherry and Swanson and the amount found thereon by Nease's cruiser. For example, it shows that Nease's cruiser found no timber on the East half of Section 34, Township 35 North, Range Five East, and that Mr. Wherry found thereon as follows:

On the Northeast quarter of the Northeast quarter, 15,000 white pine, 220 bull pine, 7,000 white fir, 135,000 red fir and 750 poles;

On the Northwest of the Northeast, 10,000 yellow pine, 120,000 bull pine, 65,000 white fir, 60,000 red fir, and 7,000 poles;

Southwest of the Northeast, 195,000 bull pine, 50,000 white fir, 80,000 red fir, 4,000 poles;

Southeast of the Northeast, 15,000 white pine, 160,000 bull pine, 50,000 white fir, and 155,000 red fir, and 7,500 poles.

Northwest of the Southeast, 10,000 white pine, 110,000 bull pine, 60,000 white fir, 140,000 red fir, 7,000 poles;

Southwest of the Southeast, 45,000 bull pine, 30,000 white fir, 50,000 red fir, 3,000 poles;

Southeast of the Southeast, 15,000 white pine, 10,000 yellow pine, 20,000 bull pine, 30,000 white fir, 85,000 red fir and 4,000 poles.

The statement shows that Nease estimated and reported to Clearwater County white pine upon section 25, township 37 north, range five east, and that Wherry and Swanson found thereon as follows:

Northeast of the Northeast, Nease, 500,000; Wherry, 865,000; Swanson, 880,000.

Northwest of the Northeast, Nease, 600,000; Wherry, 1,155,000; Swanson, 1,115,000.

Southwest of the Northeast, Nease, 500,000; Wherry, 600,000; Swanson, 545,000.

Southeast of the Northeast, Nease, 700,000; Wherry, 780,000; Swanson, 760,000.

Northeast of the Northwest, Nease, 250,000; Wherry, 175,000; Swanson, 185,000.

Northwest of the Northwest, Nease, 250,000; Wherry, 420,000; Swanson, 455,000.

Southwest of the Northwest, Nease, 300,000; Wherry, 700,000; Swanson, 690,000.

Southeast of the Northwest, Nease, 600,000; Wherry, 540,000; Swanson, 540,000.

Northeast of the Southwest, Nease, 350,000; Wherry, 505,000; Swanson, 520,000.

Northwest of the Southwest, Nease, 500,000; Wherry, 615,000; Swanson, 600,000.

Northeast of the Southeast, Nease, 900,000; Wherry, 1,175,000; Swanson, 1,120,000.

Northwest of the Southeast, Nease, 500,000; Wherry, 975,000; Swanson, 915,000.

Southwest of the Southeast, Nease, 500,000; Wherry, 765,000; Swanson, 790,000.

Southeast of the Southeast, Nease, 200,000; Wherry, 245,000; Swanson, 250,000.

The remainder of the statement is of like nature showing differences in varying degrees between the estimates of Wherry and Swanson and the Nease cruiser of timber upon the several forty acres covered by the statement.

The plaintiff by its counsel objected to the statement being received in evidence on the following grounds:

(1) The purpose of the statement offered is to show that the cruise made by Mr. Wherry and Mr.

Swanson in March, April and May, 1916, is at variance with the cruise made by Mr. Nease under his contract and filed with the county. It does not tend to show any collusion or fraud. That the fact, if such it be, that the estimates made by Wherry and Swanson did not agree with the estimates made by Nease's cruise of the same land is not material to any of the issues in this case. The question whether the Nease cruise is in some respects inaccurate is not a matter to be tried in this case.

(2) That under the terms of the contract between Nease and the defendant county, Nease was bound and it was his privilege to recruse and make good any work that the county rejected. If any of Nease's work was faulty the remedy of the county was to require the work to be made good.

(3) After having accepted the work the county could not now relieve itself from such acceptance by showing that some of the work was improperly done.

(4) That the contractor Nease gave a bond to the defendant county for the faithful performance of his work. There is no evidence or claim that there has been any concealment from the county of the character of the work done.

The court overruled the objection and permitted the statement to be received in evidence.

This ruling of the court was error.

This appears as assignment of error No. VI at page 772 of the printed record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at pages 263 and 264 of the printed record. Defendant's Exhibit 4 appears at pages 596 to 623 inclusive of the printed record.

XI.

Because the court erred in admitting in evidence Defendants' Exhibit Number Five, which was a statement offered in evidence by the defendants comparing the amount of timber estimated by Mr. Roy Wherry upon certain lands therein described as compared with the amount reported thereon by M. G. Nease to the defendant county as the result of the cruise by his men of the same lands, to-wit:

The statement shows that Nease estimated and reported to Clearwater County white pine upon sections 25 and 35 in Township 37 North, Range five East, and that Wherry found thereon as follows:

Southwest of the Southwest of Section 25,
Nease, 200,000; Wherry, 260,000;

Southeast of the Southwest of Section 25,
Nease, 200,000; Wherry, 225,000;

Northwest of the Northeast of Section 35,
Nease, 150,000; Wherry, 290,000;

Southwest of the Northeast, Nease, 0; Wherry,
100,000;

Southeast of the Northeast, Nease, 150,000;
Wherry, 520,000;

Southeast of the Northwest, Nease, 100,000;
Wherry, 75,000.

The remainder of the statement is of like nature showing differences in varying degrees between the estimates of Wherry and Nease's cruiser of timber upon the several forty acres covered by the statement.

The plaintiff objected to the statement being received in evidence upon the same grounds upon which it objected to the introduction of evidence of Defendants' Exhibit Number Four, which are set out in full under specifications of error No. X above. The objection was overruled and the statement was received in evidence and marked Defendants' Exhibit Number Five. This ruling of the court was error.

This appears as assignment of error No. VII at p. 776 of the printed record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 265 of the printed record. Defendants' Exhibit 5 appears at pages 624 to 631 inclusive of the printed record.

XII.

Because the court erred in admitting in evidence Defendants' Exhibit Number Eleven, which is the topographic sketch on the back of the original field report of the witness Roy Wherry of his cruise of Section six, Township 38 North, Range six East, which he made for M. G. Nease, and the original topographic plat of said section turned in by Nease as a part of his report on the same section to Clearwater County.

The plaintiff objected to said documents being received in evidence on the ground that they did not tend to prove anything which is in issue in the case. The court overruled the objection and the said document was received in evidence and marked Defendants' Exhibit Eleven. This ruling of the court was error.

This appears as assignment of error No. VIII at page 778 of the printed record.

Defendants' Exhibit Eleven is not printed in the record but the original has been sent up to this court under order of the District Court. (Record p. 789.)

The evidence offered, appellant's objections thereto and the ruling of the court appear at page 280 of the printed record.

XIII.

Because the court erred in admitting in evidence Defendants' Exhibit Number Eighteen, which was a statement identified by the witness James A. Morrow, showing the comparative results of the cruise of certain lands made by James A. Morrow and the cruise made by Nease for Clearwater County of the same lands, to-wit:

The statement shows that Nease estimated and reported to Clearwater County, white pine upon section 18, township 35 north, range five east, and that Morrow found thereon as follows:

Northeast of the Northeast, Nease, 35,000 yellow pine, 10,000 bull pine, 15,000 white fir, 35,000 red fir, 10,000 tamarack; Morrow, 210,000 yellow pine,

80,000 white fir, 380,000 red fir, 70,000 cedar, 20,000 cedar poles.

Southeast of the Northeast, Nease, 20,000 yellow pine, 10,000 bull pine, 20,000 white fir, 30,000 red fir, 10,000 tamarack; Morrow, 320,000 yellow pine, 170,000 red fir.

Northeast of the Southeast, Nease, 85,000 yellow pine, 50,000 white fir, 65,000 red fir, 90,000 tamarack, 10,000 spruce, 15,000 cedar, 7,000 cedar poles; Morrow, 215,000 yellow pine, 200,000 white fir, 320,000 red fir, 100,000 cedar, 90,000 cedar poles.

Southwest of the Northeast, Nease, 20,000 white pine, 85,000 yellow pine, 120,000 white fir, 85,000 red fir, 25,000 tamarack, 25,000 spruce, 5,000 cedar poles; Morrow, 50,000 yellow pine, 70,000 white fir, 230,000 red fir, 70,000 cedar poles.

Northwest of the Northeast, Nease, 15,000 white pine, 85,000 yellow pine, 125,000 white fir, 80,000 red fir, 20,000 tamarack, 30,000 spruce, 5,000 cedar poles; Morrow, 35,000 white pine, 120,000 yellow pine, 90,000 white fir, 330,000 red fir, 55,000 cedar, 100,000 cedar poles.

Southwest of the Southeast, Nease, 25,000 yellow pine, 120,000 white fir, 90,000 red fir, 100,000 tamarack, 30,000 spruce, 20,000 cedar, 5,000 cedar

poles; Morrow, 140,000 yellow pine, 100,000 white fir, 180,000 red fir, 10,000 cedar, 20,000 cedar poles.

Northwest of the Southeast, Nease, 30,000 yellow pine, 20,000 bull pine, 250,000 white fir, 75,000 red fir, 100,000 tamarack, 25,000 spruce, 15,000 cedar, 5,000 cedar poles; Morrow, 100,000 yellow pine, 90,000 white fir, 240,000 red fir, 25,000 cedar.

Northeast of the Southwest, Nease, 80,000 yellow pine, 45,000 bull pine, 35,000 white fir, 125,000 red fir, 50,000 tamarack, 20,000 spruce, 4,000 cedar poles; Morrow, 20,000 white pine, 65,000 yellow pine, 110,000 white fir, 300,000 red fir.

Southeast of the Southwest, Nease, 60,000 yellow pine, 50,000 bull pine, 100,000 white fir, 175,000 red fir, 155,000 tamarack, 85,000 spruce, 3,000 cedar poles; Morrow, 10,000 white pine, 340,000 yellow pine, 100,000 white fir, 480,000 red fir.

Southwest of the Southwest, Nease, 225,000 yellow pine, 70,000 bull pine, 75,000 white fir, 230,000 red fir, 75,000 tamarack, 15,000 spruce, 7,000 cedar poles; Morrow, 210,000 yellow pine, 70,000 red fir.

Southeast of the Northwest, Nease, 40,000 white pine, 90,000 yellow pine, 90,000 white fir, 150,000 red fir, 10,000 tamarack, 25,000 cedar poles; Morrow, 20,000 white pine, 225,000 yellow pine, 140,000

white fir, 510,000 red fir, 260,000 cedar, 240,000 cedar poles.

The plaintiff objected to the said statement being received in evidence for the reason that a comparison of the cruises made by Mr. Nease and Mr. Morrow upon the same lands was not relevant or material to any of the issues in the case. The objection was overruled by the court and the statement was received in evidence and marked Defendants' Exhibit 18. This ruling of the court was error.

This appears as assignment of error No. IX at page 778 of the record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 285 of the printed record.

Defendants' Exhibit 18 appears at pages 632 to 643 inclusive of the printed record.

XIV.

Because the court erred in admitting in evidence Defendants' Exhibit Number 33 under the following circumstances:

The defendants' counsel propounded the following question to the witness M. G. Nease, a witness for the defendant:

“Have you prepared any statement with reference to the costs of this cruise?”

To which the witness answered: “Some.”

Thereupon the defendants’ counsel asked the witness Nease the following question:

“Will you produce it?”

The plaintiff then objected to the question and to the reception of any evidence of the cost of the witness Nease of the cruise on the ground that such cost was irrelevant and immaterial to any of the issues in the case and would not in any way tend to prove what was a reasonable contract price for the work. The court then overruled the objection and the witness Nease produced a statement of the amounts paid by him to his cruisers and compassmen when employed in the work of cruising for the defendant county and the defendants’ counsel then offered the same in evidence. The plaintiff by its counsel objected to the reception of the said statement in evidence on the ground that the same did not tend to prove any of the issues in the case, did not tend to prove whether the contract was entered into in good faith and did not tend to show what was a fair contract price for the work. The court then overruled the objection and the state-

ment was received in evidence and marked Defendants' Exhibit Number 33.

The ruling of the court in admitting the statement in evidence was error.

This appears as assignment of error No. XI at page 781 of the record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 330 and 331 of the printed record.

Defendants' Exhibit No. 33 appears at pages 669 to 674 inclusive of the printed record, and is a tabulated statement showing the amount paid by Nease to each of his cruisers and compassmen, and the number of days each was employed for work done under his contract with defendant county.

XV.

Because the court erred in admitting any evidence in regard to the cost to M. G. Nease of the work done by him for the defendant county under his contract with it.

This appears as assignment of error No. XII at page 782 of the record.

The court, at the request of appellant, ruled that objection made to the receiving in evidence

of Defendants' Exhibit 33 should be understood as urged to all enquiry into the cost of the work. (Printed Record p. 331.) This avoided taking the time of the court in needless repetition of the objection and is sufficient to save the objection to all such evidence in this court.

XVI.

Because the court erred in overruling the objection of the plaintiff to the following question asked by the defendants' counsel of the witness L. E. Albright, a witness for the defendant:

“How many times did Mr. Weir pass through each forty while you were working with him?”

The plaintiff objected to this question and to the witness answering the same on the ground that the evidence sought to be adduced was incompetent, irrelevant and immaterial and did not tend to show that the transaction in question was not in good faith nor tend to impeach the contract sued upon. And the plaintiff's counsel then requested that the objection might be understood as going to all evidence offered for the same purpose; and the court ruled that it would be so understood and thereupon overruled the objection; and the witness answered:

“A double run for about a week and a single run the balance of the time.”

This ruling of the court was error.

This appears as assignment of error No. XIII at page 782 of the record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 365 of the printed record.

XVII.

Because the court erred in admitting in evidence Defendants' Exhibit Number 35, which was the field book used by the witness L. E. Albright in his work with the witness Roy Wherry and the witness John Swanson in their doing check cruising for the defendant county in the months of March, April and May, 1916. This book was offered in evidence by the defendants' counsel and the plaintiff objected to the same being received in evidence upon the same ground that the plaintiff had theretofore objected to the evidence of the work done by the witness Wherry and the witness Swanson and especially Defendants' Exhibits Four and Five and particularly upon the ground that there was no issue in the case on trial as to whether Nease's work had been accurately or inaccurately done, and that if any of the work done by Nease for the defendant county was inaccurate, the remedy of the

county was to require Nease under the terms of his contract to make good the work. The court overruled the objections and the field book was thereupon received in evidence and marked Defendants' Exhibit 35. This ruling of the court was error.

This appears as assignment of error No. XV at page 783 of the record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 368 of the printed record.

This field book was used by the witness in his work as compassman and shows some discrepancies between the topography, as shown by Nease's work and that of witness. An inspection of the book will show that it is impracticable to set out here more fully the substance of this evidence.

XVIII.

Because the court erred in admitting over the objection of the plaintiff any evidence as to the character or inaccuracy of the work furnished and done by M. G. Nease in performance of his contract with the defendant county dated April 15, 1914.

This appears as assignment of error No. XIV at page 783 of the record.

The printed record, at page 266, shows that objection was made and understood to extend to all evidence of this character.

ARGUMENT.

SPECIFICATION OF ERROR NO. I.

The argument in support of this specification is embodied in the argument under the following specifications of error, wherein the reasons why it was error for the District Court to dismiss the plaintiff's bill are set forth with particularity.

SPECIFICATION OF ERROR NO. II.

This specification is that the court erred, and the decree was erroneous, in that the court did not decree that each of appellant's warrants was a valid obligation of the defendant county.

(A) THE FACT THAT UNDER THE CONTRACT BETWEEN M. G. NEASE AND CLEARWATER COUNTY THE PERSONS WHO WERE TO PERFORM AND DID PERFORM THE WORK OF CRUISING WERE NEITHER ASSESSORS, DEPUTY ASSESSORS, NOR OTHER OFFICERS OF THE COUNTY DID NOT RENDER THE CONTRACT INVALID, NOR THE WARRANTS ISSUED IN PAYMENT OF THE WORK DONE THEREUNDER, VOID.

This point challenges the correctness of one of the two grounds upon which, as shown by the District Court's opinion, it held the warrants invalid.

It is conceded that the cruise was made for the use of the assessor and the board of equalization in assessing the timber lands of the county for the purposes of taxation. The proceedings taken by the board of county commissioners in entering into the contract plainly shows this. (Plfs. Ex. 3; Record pp. 479 to 494 inclusive.)

It is clear that the value of timber land for assessment purposes, as well as other purposes, depends upon the amount and quality of timber and the practicability of logging it. That it is necessary to cruise timber lands in order to determine these facts, must also be admitted. This work can be done only by persons skilled and expert in that work. The question then is: must the work of procuring this information be done by the assessor himself or his deputies, or may it be done by other persons hired by the county commissioners for that purpose?

The laws of Idaho, which were relied upon in the District Court will doubtless be relied upon in this court to sustain the contention that this work must be done by the assessor or his deputies and by no one else, and are as follows:

Section 6 of Article 18, Constitution of the State of Idaho:

“The Legislature by general and uniform laws shall provide for the election biennially in each of the several counties of the state * * * a county assessor, who is ex-officio tax collector. * * *”

Section 2119 of the Revised Codes of Idaho, as amended by Chapter 127 of the Laws of 1913 (page 474):

“The sheriff, assessor * * * shall be empowered by the board of county commissioners to appoint such clerical assistance as the business of their office may require, and deputies to receive such remuneration as may be fixed by said board of county commissioners, which remuneration shall be paid quarterly in the same manner as the salaries of the county officers are paid: PROVIDED, that any of the officers mentioned in this section requiring the services of one or more deputies or requiring clerical assistance shall, for a period of at least thirty days before any regular meeting of the board of county commissioners, publish a notice in some newspaper at the county seat, or if no newspaper is published at the county seat, then in some other newspaper published in the county or if no newspaper be published in the county, then by posting a notice in his office for a period of thirty days before said regular meeting, of his intention to apply to the board of county commissioners for a deputy or deputies or for clerical assistance, and no deputy shall be appointed or clerical assistance allowed by said board until due proof of the publication of said notice shall have been furnished said board and the necessity for said assistance is satisfactorily shown, and any taxpayer in

the county shall have a right to appear before said board and protest against said appointment and show cause why said assistance should not be allowed."

The following constitutional provisions of Idaho are also pertinent:

Article 7 contains the following provisions:

SECTION 2. "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article herein otherwise provided." * * *

SECTION 3. "The word 'property' as herein used shall be defined and classified by law."

SECTION 5. "All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

SECTION 12. * * * The board of county commissioners for the several counties of the state, shall constitute boards of equalization for their respective counties, whose duties it shall be to equalize the value of the taxable property in the county, under such rules and regulations as shall be prescribed by law."

The legislature of Idaho passed in 1913 a very complete act regulating the assessment and taxation of property. This act is Chapter 58 of the Session Laws of that year. Many of the provisions of that

act bear upon the question. As the pertinent sections are numerous and lengthy, and will be frequently referred to in this brief we printed them at the end of this brief as appendix I.

The above Chapter 58 of the Session Laws of 1913 enacted a much more complete system of assessment and taxation than theretofore existed. A cursory examination of the statute as it theretofore existed shows this to be true. (See Title 10, Vol. 1, Idaho Revised Codes, p. 725 *et seq.*) There was little in the previous law governing the manner in which the assessor should assess real estate except Sections 1652 and 1654 of Vol. 1, Idaho Revised Codes, p. 731, which are as follows:

SECTION 1652. "All taxable property must be assessed at its full cash value; lands and improvements thereon must be assessed separately."

SECTION 1654. "Real estate, and improvements thereon * * * shall be assessed by the assessor of the county * * * in which such property is situated."

The duties of the assessor in the assessment of lands under the statute of 1913 are briefly as follows:

- (1) To assess the lands at their full cash value.
- (Sec. 2.)

(2) Timber lands must be placed in a class by themselves. (Sec. 48B; Sec. 49.)

(3) In the valuation of the timber lands the value of the timber must be included, not as a separate item, but as an element in the valuation of the land. (Sec. 6.)

(4) In cases where standing timber is owned separately from the ownership of the land on which it stands it shall be assessed separately. (Sec. 50.)

The whole responsibility for the proper classification and assessment of lands does not rest upon the assessor. The duties of the board of county commissioners are fully as great, if not greater, than those of the assessor. Briefly, they are as follows:

(1) To enforce and compel a proper classification and assessment of all property required to be entered upon the real property assessment roll. (Secs. 55, 56.)

(2) For the above purpose the board is required to examine the roll, tract by tract, and name by name, and the valuation of each item of property assessed, and to raise or cause to be raised, lower or cause to be lowered the assessment of any property which, in the judgment of the board, has not been assessed at its full cash value. (Sec. 56.)

(3) To determine all complaints in regard to the assessed value of any property entered upon the roll. (Sec. 56.)

(4) Except as prohibited in the act, to correct any valuation entered upon the roll by adding thereto or subtracting therefrom such amount as may be necessary in order to make such valuation conform to the full cash value. (Sec. 56.)

(5) To correct any assessment by adding to or subtracting from the amount, number, quantity or value of any property assessed when a false, incorrect or incomplete taxpayer's statement has been rendered. (Sec. 56.)

(6) The board may require the attendance before the board of any other county officers for the purpose of furnishing information; may subpoena witnesses and hear evidence in all matters relating to the assessment of property. (Sec. 62.)

(7) The changes in assessments and all new assessments ordered by the board shall be entered on the roll, and shall have the same force and effect as if made and entered by the assessor in the first instance. (Sec. 58.)

The statute further provides that:

(1) Any county officer upon whom any duties

devolve under the act or the revenue laws of the state who wilfully neglects to perform such duty or who performs them in a careless or incompetent manner may be removed from office. (Sec. 211.)

(2) Any assessor or commissioner who wilfully or knowingly enters or suffers to be entered any untrue or incorrect classification of land is penalized in the sum of \$1,000.00. (Sec. 68.)

The full responsibility for seeing that all lands within the county are correctly classified and assessed rests both on the assessor and on the board of county commissioners. The legislative intent is manifest to encourage and indeed require a thorough, competent, careful and uniform classification and assessment of all lands. It is much more thoroughgoing in its requirements than any previous law of the State of Idaho. Careless and incompetent assessments and classifications are directly condemned.

On the other hand, it is clearly manifest that the legislature did not intend to prescribe or limit the means by which such a competent, careful, adequate and uniform assessment and classification should be insured. The manner by which the county officers should accomplish the result required of them was left to their discretion. The legislature

properly realized that the varying conditions of the several counties would call for varied means.

To classify and assess large bodies of timber land such as exist in Clearwater County without any knowledge of the amount, character, quality and logging possibilities of the timber thereon would surely be making such classification in a "careless and incompetent manner."

The District Court was of the opinion that the board of county commissioners was not without authority to incur expense in obtaining information to enable them to intelligently perform these functions (Record p. 190), and we apprehend that the contrary will not be contended.

The position of the respondent county, which was sustained by the District Court, is that the only way in which such information can be procured is by the appointment of a sufficient number of competent timber cruisers as deputy assessors to make the necessary cruise. There is no such express limitation in the statute. It is sought to infer this limitation from the fact that Section 2119, *supra*, of the Revised Codes of Idaho, as amended by Chapter 127 of the Laws of 1913, p. 474, authorizes the appointment of such deputy assessors as the business of the office may require.

It is obvious, however, that this statute, which does nothing more than to provide for deputies, has no bearing on the question. It simply provides for additional persons to do the assessor's work. It cannot be construed to add anything to the official functions which can be performed by the assessor only. If the cruising of timber is an act which, under the law, must be done by the assessor in his official capacity; if the information to be procured by such a cruise can be procured only by the cruise of the assessor himself; then such information must be so procured no matter whether he be empowered to appoint deputies or not.

It remains to consider whether the work done by Nease was work which the law specifically required the assessor to do. We have seen that the statute contains no express prohibition against the procuring of this information by contract with private parties. It has been, and doubtless will be, argued that such a contract is beyond the powers of the commissioners because they cannot hire private parties to do the specific thing which the law requires the officer himself to do. There is no doubt about this principle of law. However, it has no application to the facts of this case. This will be made clear by considering, with particularity, just

what it is that the assessor is required to do. He is to classify and assess land. His official duty consists in placing upon the rolls, e. g., the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of a certain section, as timber lands valued at one thousand dollars. In brief, it consists of three steps: (1) A listing of the lands; (2) a classification; and (3) a valuation. It is undeniably true that in order to make the classification and valuation he must have information. He may have had that information within his own knowledge when he was elected. It is more probable that he will have to acquire it from some source. The law leaves him to get it in any way he can. He may procure it by conversation with his next-door neighbor or from the opinion of acquaintances in the neighborhood of the property, or he may be satisfied with the opinion of the owner. The acquisition of the information is not the assessment nor any part of it. It simply qualifies the assessor to properly perform the official function. The information which enables him to put a proper valuation upon a piece of land, has, as information, no official status. Let us suppose that the assessor should, in person, cruise a section of timber land for the purpose of determining the amount of timber on it to enable him to properly value it. When he has done so, he has simply procured information.

There is no way, under the law, by which that information can be given any official status. It simply guides him in fixing the value. The valuation only is his official act.

This is quite obvious from the fact that the statute neither requires nor permits, except as hereafter stated, the timber to be separately listed or valued. When the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of a certain section is placed upon the rolls, it is completely listed no matter how much timber it has on it. The knowledge as to the timber is only for the purpose of enabling the land to be properly classified as timber lands, and properly valued. It is information as to the nature and quality of the land as affecting its value. Such information does not differ in kind from information that a piece of land has a coal mine on it. It is information which does not require or permit the assessor to assess this quality, i. e., timber, separately, but does enable him to value the land as a whole correctly.

There is one exception to the above. Where the timber is owned separately from the land, the timber must be entered upon the real property assessment roll separate and apart from the land; but this exception does not affect the argument.

It must be conceded that the assessor himself

cannot be compelled to cruise all the timber lands in Clearwater County. No doubt the assessor of any county in the State of Idaho has the right to cruise all the timber lands in his county for the purpose of enabling him to properly classify and assess them. He is doubtless privileged to do so if he has the ability and the means; but he is not specifically so required.

On this point the Supreme Court of Indiana, in the case of *City of Richmond et al. vs. Dickinson*, 58 N. E., at page 261, said:

“So it is important not to confuse a privilege or right on the one hand with a duty required by law on the other. Under the statute there is no doubt of the right of the county auditor (city clerk) to procure ‘credible information’ as best he can, concerning secreted and omitted property. But does the law lay upon him the duty to hunt for omitted property? Must he assume that the returns of the taxpayers are false—not merely the returns for the current year, but for an indefinite period prior to his incumbency? If he intentionally fails or refuses to act upon such an assumption, must he pay a fine, and go to jail? If he must act upon such an assumption to save himself then he is bound at his peril to investigate the correctness of the returns of every taxpayer within his jurisdiction for every year the taxpayer might be liable to taxation on omitted property. But such is not the duty required by statute.”

That the county commissioners, being bound

by the statute to enforce a complete and proper classification and assessment, had the power to contract with private persons to procure the information necessary to enable the assessor and themselves properly to classify and assess the lands, is settled by the following authorities:

Prothero vs. Board of Comrs. of Twin Falls Co., 127 Pa. Rep. 175 (Idaho).

Wilhelm vs. Cedar County, 50 Ia. 254.

Disbrow vs. Board of Supervisors of Cass County, 93 N. W. 585 (Ia.).

Shinn vs. Cunningham, 94 N. W. 941 (Ia.).

Reed vs. Cunningham, 96 N. W. 119 (Ia.).

Burnett vs. Markley, 31 Pac. Rep. 1050 (Or.).

Tasker vs. Commissioners of Garrett County, 33 Atl. 407 (Md.), 82 Md. 150.

State ex rel. Herren vs. Hall, 63 Pac. 13 (Or.).

Martin vs. Whitman County, 1 Wash. St. 533.

City of Richmond vs. Dickinson, 58 N. E. 260 (Ind.).

The case of *State vs. Goldthait*, 87 N. E. 133 (Indiana), is a case holding that a contract by county commissioners employing a private person to secure a particular kind of information in regard to property omitted from the assessment roll was invalid. This case, however, is not in conflict with

the other Indiana cases first cited above, nor with the contention of the appellant here. In the *Goldthait* case the contract was condemned because the assessor was specifically required by the statute to do the precise thing, i. e., search the records, that the private party was hired to do. The contract was a direct infringement upon the functions of the assessor. The distinction between that case and the case at bar is clear. In the following cases, similar contracts were condemned:

Grannis vs. Board of Com'rs of Blue Earth County, 83 N. W. 495 (Minnesota).

Chase vs. Board of Com'rs of Boulder County, 86 Pac. 1011 (Colo.).

Stevens vs. Henry County et al., 75 N. E. 1024 (Illinois).

These cases are based upon the fact that no power or duty was imposed upon the commissioners in regard to the assessment of property. The distinction between these cases and the case at bar is apparent.

The lower court, in its opinion, propounds the question: "Assuming that a cruise was needed, why could it not as well have been made under the direction of the assessor, by qualified deputies appointed for that purpose?" Perhaps it could. But we are dealing here, not with a question of policy, but of

power. It may be that the court's judgment as to what should have been done was better than that of the commissioners. But it is not the function of the court to decide whether the county commissioners used good judgment, but whether they had power to exercise their judgment at all.

Nor is there any value in the suggestion that a cruise made by the assessor and his deputy would, when completed, have had the sanction of the law and a legal status. Under the statute, lands must be assessed each year. Information obtained by a cruise by the assessor in one year would have no official status. The only acts of the assessor that have such status are the classification and valuation of the land. The assessor for the following year would be just as free to disregard the cruise of his predecessor as to disregard the cruise of Nease. How a cruise made by the assessor could, under the laws of Idaho, have "the sanction of law and a legal status," as suggested by the District Court, has not been pointed out.

There is an additional reason why the county commissioners have the right to procure this information by having the work done by persons other than the assessor. They are bound, as well as the assessor, to see that the valuation placed upon each

piece of property is correct. They are not bound by the assessor's valuation, nor are they bound by his information. They are specifically authorized to subpoena witnesses, and hear evidence in all matters relating to the assessment of property. (Section 62.) If it is proper that such information should be obtained at all (and this seems to be conceded), then it was certainly within the discretion of the county commissioners to determine whether they could best get it from the assessor or from somebody else. To hold otherwise, and that a cruise made by the assessor would be binding upon them, would be to nullify the powers of the commissioners and leave them wholly at the mercy of the assessor.

The precise question was decided by the United States District Court for the Western District of Washington, which held that a contract by county commissioners with a private person or corporation for the cruising of timber for the purpose of supplying the assessor and board of commissioners with information to be used in the assessment of timber lands does not trespass upon the functions of the county assessor. The contract before the court in that case was the same kind of a contract as that involved in the case at bar. The same objection was made to it as is now under consideration in this

case. In the opinion in that case the District Court said:

“It is contended on the part of the defendant that the commissioners are powerless to enter into such a contract, and that they are trespassing upon the functions of the county assessor, because the information to be adduced by the plaintiff was work which should be done by the county assessor, and that the county assessor had the right under the law to select his deputies, and the commissioners only have the right to fix the compensation.

“While it may be true that the information which is sought by this contract is information which undoubtedly was for the purposes of the county assessor’s office, it likewise was information which the county commissioners necessarily must have in order to fully and properly discharge the duties of the board in equalizing the assessments of the county (sections 9200-9207, Remington & Ballinger’s Codes of Washington), as a basis for the levy for taxes. The county commissioners are not concluded by the valuations placed upon property by the county assessor, nor is the assessor bound by the valuations fixed by plaintiff. The timber lands in this country are of such a character, and the value of timber is a matter which is not within the common knowledge of citizens, and under the system of listing and assessing property it is practically impossible for the assessor to list and assess the timber upon lands in his county without aid given by persons who have special knowledge or qualifications. The proper administration of the business of the county is through its authorized administrators, the county commissioners, upon whom must fall the burden of securing the expert information

which cannot be obtained otherwise. *Burnett vs. Markley*, 23 Or. 436."

Pacific Timber Cruising Co. vs. Clarke County, Wash., 233 Fed. 540.

(B) NEITHER THE CONTRACT BETWEEN CLEAR-WATER COUNTY AND M. G. NEASE, NOR THE PERFORMANCE THEREOF BY NEASE, NOR THE ISSUANCE TO NEASE IN CONSIDERATION OF SUCH PERFORMANCE, OF THE WARRANTS NOW HELD BY THE APPELLANT AND UPON WHICH THIS SUIT WAS BROUGHT, WAS IN VIOLATION OF SECTION 3 OF ARTICLE 8 OF THE CONSTITUTION OF IDAHO.

This is the principal question in this case. In fact it is the controlling question.

Section 3 of Article 8 of the Constitution of Idaho is as follows:

"No county, city, town, township, board of education, or school district, or other subdivision of the State shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary

to this provision shall be void; *Provided, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the State.*" (Italics ours.)

This section is taken from Art. XII, Sec. 18 of the constitution of 1879 of the State of California. However, the section, as it appears in the California constitution, does not contain the proviso which occurs in the Idaho constitution. Since the question involved is the proper construction of the proviso, no help can be expected from the decisions of the California courts.

It is conceded by the appellant that the indebtedness in question was incurred without the assent of the electors at an election held for that purpose. It is further conceded that at the time of incurring such indebtedness, no provision was made for the collection of the annual tax sufficient to pay the interest on the indebtedness, and to constitute a sinking fund for the payment of the principal; and it is further conceded that such indebtedness exceeded the income and revenue for the year in which it was incurred.

Therefore, the question is, whether the indebtedness in question falls within the terms of the proviso. In other words, was the purpose for which it was incurred "ordinary and necessary

expenses authorized by the general laws of the State?" If the indebtedness in question was not such an ordinary and necessary expense, it is invalid. If it was such an ordinary and necessary expense, it is valid.

The question has been squarely decided by the Supreme Court of Oregon, in the case of *Wingate vs. Clatsop County*, 71 Ore. 94; 142 Pac. 561. This case involved the question of the validity of a debt against Clatsop county, incurred for the cruising of timber of that county for assessment purposes under a contract substantially identical with the one at bar. It was claimed in that case that the indebtedness was in violation of section 10 of article 11 of the constitution of Oregon, as amended in 1911. This section is as follows:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection, or repel invasion, or to build permanent roads within the county, but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question."

The difference between the Idaho constitution and the Oregon constitution is this: Under the Oregon constitution no debt can be created above \$5,000.00, except to suppress insurrection, or repel

invasion, or to build permanent roads. Except for the specified purposes, the prohibition against any indebtedness above \$5,000.00 is absolute. Under the Idaho constitution any indebtedness in excess of the annual revenue is prohibited, except for ordinary and necessary expenses. There is no limitation on indebtedness for ordinary and necessary expenses.

It is quite obvious, therefore, that the constitution of Oregon is, at least, as severe in its prohibition as the constitution of Idaho. Nevertheless the Supreme Court of Oregon held, in the *Wingate* case, that an indebtedness incurred by Clatsop county, for the cruising of timber for assessment purposes, was not within the prohibition of section 10 of article 11 of the constitution of Oregon.

Moreover, the statutes of Oregon governing assessments are not so drastic as the statutes of Idaho in imposing a duty upon the assessor and board of equalization to see to it that a competent, careful, classification and assessment is made. The duties of the assessor and board of equalization, under the Oregon law, are set forth in sections 3586, 3605-3608-3609 of Lord's Oregon Laws, and are set forth in appendix II to this brief at page 135. If, under the Oregon constitution and statutes, a debt incurred for cruising timber, to enable the

assessor and board of equalization to properly assess the land, is a debt incurred in carrying out the duties imposed upon the county by law, then certainly a like debt incurred by a county under the constitution of Idaho is "an ordinary and necessary expense authorized by the laws of the State." In fact, the warrants in the case at bar, under the authority of the *Wingate* case, would be valid irrespective of the saving force of the proviso in the Idaho constitution.

(a) The indebtedness in question was a necessary expense within the meaning of the proviso. It may be, as stated by the District Court in its opinion, (Record pp. 194-195) that this proviso is so incapable of precise construction as to leave a deplorable element of uncertainty in the fundamental law, and that the courts cannot be expected to make specific that which the constitution has left general. Undoubtedly the makers of the constitution had no intention of imposing on the courts any such burden. They must have realized also that the terms which they were using were general, and that by the use of them they were conferring general powers upon the political department of the government.

The term "necessary," as applied to a county

expense, includes any means reasonably calculated to produce the end.

Cotton vs. Com'rs, 6 Fla. pp. 629-630.

The end sought to be accomplished in the case at bar was the proper and careful classification and assessment of lands. This end was "authorized by law" within the meaning of the proviso in question. It follows that an expense reasonably calculated to produce such authorized end was a "necessary expense authorized by the general laws of the State."

That it is necessary that the assessment of property for taxation shall be uniform must be conceded. Article VII, section 5, of the constitution of Idaho so requires. The statute also so requires. (Chapter 58, Session Laws of Idaho, for the year 1913, sections 39, 56. The statute also requires that all property shall be assessed at its full cash value, as near as practicable, and shall be classified. (Chapter 58, Session Laws of Idaho, 1913, sections 39, 48, 49, 56. (See appendix I, page 126, this brief.)

The statute requires the board of county commissioners to enforce a proper classification and assessment according to the provisions of the act. (See section 56, appendix to this brief, page 130.) The act especially condemns the performance of this work in a careless and incompetent manner.

(See section 211, appendix to this brief, page 132.)

It is obvious that lands cannot be either classified or valued for assessment as required by this act, unless the assessing officers know whether it is timber land, and if so, the quantity, character, and quality of the timber. It is common knowledge that the amount, character, and quality of the timber is the chief determining factor in the valuation of timber lands. The difficulties which the officers of Clearwater county had encountered in attempting to assess such lands without such knowledge is shown by the testimony of P. H. Blake, who was assessor of the county at the time the Nease contract was entered into. (Record pp. 413, 414, 416, 417, 418, 419.) This was further shown by the testimony of the witness Harrison, who was one of the county commissioners at that time; (Record pp. 301 to 304) and of the witness Zelenka, who was also one of the commissioners at that time. (Record p. 361.) If the assessing officers could not make such an assessment as the law required without this information they surely were "authorized" to procure it.

(b) The indebtedness incurred was an ordinary expense within the meaning of the proviso. If it be conceded that the information in regard to the

quantity, quality, and character of the timber was necessary to make a valuation of the timber land, then the county commissioners were authorized to meet that necessity, i. e., get that information in the ordinary way. What is the ordinary way of finding out the quantity, character, and quality of timber upon lands? A cruise is not only the ordinary method, but it is the only known method. It follows that an expense incurred by the county commissioners in getting this information by a cruise was an ordinary expense as well as a necessary expense. The mere fact that the county had not theretofore been meeting this necessity—that it had not been making a careful and competent assessment of its timber lands, as the law required,—does not show that the way in which they did meet it, when they finally determined to meet it, did not constitute an ordinary expense. *An ordinary expense is one that meets a necessity in the ordinary way.* So far as we have been able to determine, the term ordinary expense, as applied to governmental expenditures, has not frequently been the subject of judicial construction. It has been held, however, that it cannot mean less than the necessary expenses incurred in administering the government of the county under the statutes relating thereto in such a manner as will best carry out the obligations imposed upon

the county by law.

Mills vs. Township of Richland, 40 N. W. 183 (Mich.).

Intendant & Town Council of Livingston vs. Pippin, 31 Ala. 542.

The mere fact that the expense does not frequently recur or, in fact, occurs but once does not make it an extraordinary expense.

Hickey vs. City of Nampa, 22 Idaho, 41, 124 Pac. 280.

The practical value of such a cruise as was made by Nease is shown by the use made of a like cruise in the State of Oregon as appears from the case of *In re Weyerhaeuser Land Company*, decided by the Supreme Court of Oregon, since the decision of this case and reported in 165 Pac. Rep. at page 1164.

(c) It may not be amiss to notice with more particularity the reasons advanced by the trial court for holding the expense not to be an ordinary or necessary expense:

1. One reason which the District Court assigns is that the statute requires the assessor to determine the full cash value of land only "as near as practicable," and that inasmuch as absolute accuracy is unattainable the assessing officers "are to do the best they can with the means at their disposal to

approximate, as near as may be, the unattainable ideal." (Record pp. 197 to 201.)

The fault with this argument is that the conclusion does not follow from the premise. The requirement that the assessing officers find the true cash value "as near as practicable" means, if it means anything, that they are to do the best they can after exercising all the powers at their command. The fact that they cannot attain absolute accuracy does not relieve them from the obligation of doing the best they can. To say that they must do the best they can "with the means at their disposal" begs the question, for the question is:—What means are at their disposal? The conclusion of the court is that although the necessity rests upon the commissioners to see to it that a careful and competent assessment is made, there is no necessity for them to employ the means which will enable them to do it.

2. Another reason which the District Court assigns is that an expense incurred by the county commissioners to enable them to more efficiently perform their duty by having a proper classification and assessment, as required by the statute, is not an ordinary and necessary expense because it was the intention of the Idaho constitution to adopt a

policy which "entails a measure of crudity and inefficiency in local government," thinking it best "to sacrifice a measure of efficiency for a degree of safety." (Record pp. 201-202.) In other words, as applied to the case at bar, the reasoning of the District Court is that it was the intention of the constitution to forbid the county commissioners to create debts in excess of the current revenues, and, at the same time, to enforce upon them the necessity of continuing an outworn and inefficient system of getting in the revenue. This is an unwarranted construction. It may be, as stated by the District Court, that the Idaho constitution is imbued with the spirit of economy. But it is equally true that specific authority is given to the county commissioners to incur debts for any ordinary and necessary expense that is authorized by law. It is also true that the Legislature has required them to make a careful and competent assessment of all property. The Legislature had undoubted power to so require. The Legislature has, to this extent at least, put its disapproval upon the continuance of crudity and inefficiency in local government. It would seem, therefore, that an expense incurred by the county commissioners to enable them to perform this duty is a necessary expense "authorized by law," within the meaning of the proviso of the constitution.

3. The District Court also suggests that the indebtedness in question is not a necessary and ordinary expense, because neither the assessor, nor the county commissioners would be guilty of a misdemeanor under sections 64 and 68 of the Act, nor could they be proceeded against under section 211 of the Act, if they failed to have a cruise made ; (Record p. 200) nor could they be proceeded against by mandamus to compel them to do so. (Record p. 206.) Without stopping to inquire whether they could be so punished, we submit that mandamus would lie against the commissioners to compel them to take the steps necessary to enable them to make such an assessment as the law requires.

Harris vs. State, 34 S. W. 1017 (Tenn.).

State Board of Equalization vs. People ex rel. Goggin, 58 L. R. A. 513, (Ill.).

Hyatt vs. Allen, 54 Cal. 353.

People vs. Shearer, 30 Cal. 645.

People ex rel. Geneva vs. Board of Supervisors of Ontona Co., 100 N. Y. Sup. 330.

It would be more pertinent to inquire whether the assessor could be compelled by mandamus to make a classification and valuation of lands as required by the statute unless, and until, the commissioners, upon whom the duty rests to see to it

that such classification and valuation is made, furnished him either with the information necessary to enable him to do so or the necessary means to procure such information.

Harris vs. State, supra.

But whether mandamus would or would not lie is a question not necessary to the decision of this case. The county commissioners were surely bound to procure the information necessary to enable them to do their duty. If there were several ways in which they could get the necessary information it would rest in their discretion to take whichever way to them seemed best and, under such circumstances, mandamus would not lie to compel them to pursue any particular method. But it does not follow that because they could not be compelled by mandamus to get the information in any particular way it was not necessary for them to get it at all.

4. The District Court relied upon the cases of *Bannock County vs. C. Bunting & Co.*, 4 Idaho, 156, 37 Pac. 277; *Dunbar vs. Board of Com'rs*, 5 Idaho 409, 49 Pac. 409. In the *Bunting* case the Supreme Court of Idaho held that an indebtedness incurred for the purchase of a court house site was not an ordinary expense; but that ruling is based upon the statute prescribing the procedure to be

taken for the erection of courthouses which, in the language of the Supreme Court,

“clearly indicates that the legislature did not consider this an ordinary expense of the county, as the section makes special provision for erecting courthouse, jail, and other public buildings, as follows: * * *; thus indicating beyond question that the construction of courthouses, jails, and other public buildings was an extraordinary expenditure.”

In the *Dunbar* case, the Supreme Court of Idaho made the same ruling in regard to a bridge, but under the same statute.

5. It was also suggested by the District Court that if this contract can be sustained, another of like character for a second cruise can be made at any time. (Record p. 204.) It may be that changes in the condition of the timbered sections of the county will occur, chiefly from the cutting of timber in logging operations. It will be a simple matter for the assessing officers to make such corrections in the cruise as such changed conditions shall entail, and at a very small expense. But we fail to see how it follows that, because the necessity now exists for the obtaining of information not now at hand, a like necessity will exist for procuring the same information after it has been obtained.

6. There is another objection made to the va-

lidity of the warrants in question which rests upon an entirely different footing from any of the other objections made. This objection is based upon the following facts:

The contract between the defendant county and Nease provides for the cruising of "all the timber on patented lands situated in Clearwater County, Idaho." (See paragraph 1 of the contract; Record p. 96.)

There were a certain amount of lands cruised and included in the estimates for which the warrants were issued which were not timbered. There were also cruised and included in the estimates, for which warrants were issued, a certain amount of lands that were not patented. A part of these unpatented lands belonged to the United States Government and a part to the State of Idaho. It was claimed by the defendants, and was so held by the District Court, that whatever might be held in regard to the necessity of cruising patented timber lands, there was certainly no necessity for cruising the unpatented or untimbered lands. The amount of patented untimbered lands so cruised and charged for was 28,082.79 acres. (Recond pp. 644-646, 288.) The reason for the cruising of these untimbered lands is that there were lying within those portions of the

county which were timbered, tracts of clear, burned, or bare land; and they were included in the estimates made, for the purpose of enabling the assessing officers to properly classify such lands as untimbered lands or cut over, or burnt timber lands, as required by section 48 of Chapter 58 Session Laws 1913; and also for the purpose of enabling the assessing officers to properly judge of the claims of timber owners in regard to the amount of lands in the timber belt, which had been cut over, or which for any other reason were untimbered. (See testimony of Zelenka, Record pp. 361 and 364; and testimony of Blake, Record pp. 419, 420; and testimony of Harrison, at pp. 303, 304.) While it may be true that the necessity for cruising these lands was not so great as the necessity for cruising lands actually timbered, yet we submit that when taken in consideration with the whole work done and the objects and purposes of the cruise, the inclusion of these lands was not sufficient to make the debt incurred for cruising them violative of the constitutional provisions.

The lands belonging to the United States Government which were cruised were cruised under an understanding between Nease and the county commissioners for the following reasons: small tracts

of government lands, e. g., forty acres or eighty acres, lay isolated in large tracts of patented timber lands. It seemed to the board of county commissioners that these lands were either in process of passing to private ownership or soon would be. It seemed to them that it was good business to include them in the cruise to avoid the necessity in the future of making cruises at greatly increased expense, of these isolated tracts. (See testimony of Harrison, Record pp. 297, 298; testimony of Zelenka, Record p. 356; testimony of Blake, Record pp. 418, 421; testimony of Nease, Record pp. 324, 343.)

That this was not done to swell the amount of lands to be cruised, but in good faith, is shown by the fact that the county took advantage of its right under the contract to withdraw timber lands from its operation, and actually withdrew a large amount of timber lands concerning which it already had what it considered to be sufficient information. (Record pp. 363, 418, 419.)

While it may be true that this anticipatory cruise, standing alone, would not be a present necessity, nevertheless when taken in connection with the whole transaction, the indebtedness created by the cruising of these lands is not violative of the constitutional provision in question.

The total amount of the state lands cruised was 6,165.46 acres. (See testimony of Becker, Record p. 396.)

It was not the intention that any non-taxable state lands should be cruised. Two thousand and eighty acres of these state lands had, however, been sold under contract to private individuals. (See Plfs' Ex. 28, Record pp. 583, 591.) These were taxable either as land or timber under Sections 6 and 38, Chapter 58 of the Session Laws of 1913, and Section 1586 of Idaho Revised Codes, Vol. 1, and therefore properly cruisable. (See testimony of Becker, Record p. 396.) The balance of the state lands cruised, amounting to 4,085.46 acres, were included through the mistake of the county commissioners in including them in the list of lands given to Nease to cruise. (See testimony of Nease, Record p. 343.) Nease cruised no state lands except such lands as he was told to cruise by the county commissioners. The inclusion of the taxable state lands was no more violative of the constitutional provision than the cruising of the patented lands.

If the county requested by mistake certain lands to be cruised which were non-taxable, this incidental mistake in the execution of the contract would not render the expense incurred for the cruising of such

lands invalid if the main purpose of the contract was valid.

However, if this court should hold that the cruising of any of the untimbered, government, or state, lands did not create a valid debt against the county, this would not render the debt incurred for cruising of the patented timber lands invalid. This court will, if it considers any part of the indebtedness invalid, reduce the appellant's claim by that amount. The facts necessary for the court to make such deduction are in the record.

The whole amount of unpatented lands, (State and United States Government lands) is 34,386.37 acres. (See defendants' exhibit 19, Record pp. 644, 647.) The whole amount of state lands was 6,165.46 acres. (Record p. 396.) The difference between these two amounts gives the amount of United States Government lands as 28,220.91 acres.

The entire amount of patented untimbered lands (28,082.79 acres; See defendants' Ex. 19, Record pp. 644, 647); non-taxable state lands (4,085.46 acres); and United States Government lands (28,220.91 acres) is 60,389.16 acres. This is the amount of land the cruise of which, it is claimed, cannot be justified as a necessary expense.

However, 8,190.26 acres of the government lands were under live homestead entries at the time they were cruised, and 2,723.14 acres have since been patented. (Record p. 405.) If these 8,190.26 acres are held properly cruisable, then the amount of 60,389.16 acres should be reduced by that amount, leaving 52,198.90 acres. We believe the above computations are correct.

If there is any error we should be glad to have it pointed out by the appellees. However, neither all of the untimbered lands cruised nor all of the United States Government lands cruised, nor all of the non-taxable state lands cruised can be charged to the plaintiff and deducted from its claim in case any deduction is made, because \$18,926.99 of the warrants issued to Nease under his contract were sold by him to the Empire National Bank and, on January 9th, 1915, paid by the Treasurer of Clearwater County. (Record p. 344; Par. 27 of the answer; Record p. 40.) The warrants so paid were issued for 80% of the amount due Nease for the two bills first filed by him with the county, as shown by plaintiff's exhibit No. 4; Record p. 495, and plaintiff's exhibit No. 6, Record p. 520. (See also testimony of Nease, Record pp. 322 and 344.)

The testimony of the witness Nease as it ap-

pears on page 344 of the record is erroneous in stating that the warrants were issued for the bills; plaintiff's exhibits 6 and 7. They were issued for the first bills rendered which are plaintiff's exhibits 4 and 6. This error is apparent because 80% of plaintiff's exhibits 4 and 6 amount to the exact amount of the warrants paid to the Empire National Bank.

The amount of United States Government lands covered by these two first bills is 9,746.98 acres. This result is obtained by comparing defendants' exhibit 20, which shows the whole amount and the description of the government lands cruised, with plaintiff's exhibits 4 and 6 (Record pp. 495, 520) which shows the description of all the lands cruised and covered by the first two bills. Plaintiff's exhibit 20 is not printed in the record but the original has been sent up.

The amount of non-taxable state lands covered by these first two bills is 1,412.94 acres. This result is obtained by comparing plaintiff's exhibit 28 (Record pp. 583 to 591), which shows the whole amount and description of non-taxable state lands cruised, with plaintiff's exhibits 4 and 6.

The amount of patented untimbered lands covered by the first two bills is 14,123.80 acres.

This result is obtained by comparing defendants' exhibit 19 (Record p. 644), which shows in the third column thereof the amount of untimbered patented lands cruised in each township, with plaintiff's exhibits 4 and 6.

The whole amount of patented untimbered lands, government lands, and non-taxable state lands, which were cruised and covered by the first two bills is 25,283.72 acres. At the contract price of $12\frac{1}{2}$ cents per acre this would total \$3,160.46. Eighty per cent of this amount was covered by the warrants issued at the time the bills were allowed and warrants for which were sold to the Empire National Bank, and paid by the county. Eighty per cent of this amount is \$2,528.36.

Therefore, if any deduction is to be made from the county's liability on account of the cruise of untimbered patented as well as government lands and state lands, \$2,528.36 of that amount is chargeable to the Empire National Bank and not to the appellant. And if a deduction is to be made for any one of these classes of lands it should be made on the basis of 80% of the contract price for the number of acres of such class of land included in the first two bills as shown above.

We believe that the above computation is cor-

rect, and if there is any error therein we shall be glad to have it pointed out by the appellees.

When we have spoken of patented untimbered lands we have included only such lands as were reported to have no timber upon a governmental subdivision of 40 acres. We did not include any untimbered lands included in a 40 acre tract which was partly timbered.

If, however, this court should find that a deduction should be made from the plaintiff's claim, and that the amount of such deduction cannot be determined from the record before it, the District Court can make such deduction under the directions of this court.

It could be determined from this record, if deemed necessary, how much of the cruised, untimbered, government, and state, lands were included in each of Nease's bills filed with the county, and a proportionate reduction made from each of the batch of warrants issued for each bill. This is unnecessary. If any such reduction is to be made the appellant consents that it may be made by the cancellation of a sufficient number of the warrants to effect the reduction, and that such warrants may be taken from the highest or lowest number. If

any odd sum remains the same can be endorsed upon any remaining warrants as a payment.

The above covers the grounds which, the District Court stated in the opinion rendered to be the basis of its judgment. We now notice the other objections of the defendants to the validity of the warrants.

(C) THE WARRANTS ARE IN THE FORM REQUIRED BY THE LAWS OF IDAHO.

The objection raised to the warrants is that they do not specify the liability for which they were drawn nor when it accrued as required by Sections 1955 and 2053 of Idaho Revised Codes of 1908, Vol. 1. These sections are as follows:

“Section 1955. Warrants drawn by order of the commissioners on the county treasury for current expenses during each year, must specify, the liability for which they are drawn, and when they accrued, and must be paid in the order of presentation to the treasurer. If the fund is insufficient to pay any warrant, it must be registered and thereafter paid in the order of its registration.”

“Section 2053. All warrants must distinctly specify the liability for which they are drawn, and when it accrued.”

(a) The warrants do specify the liability for which they were drawn.

Not all of the warrants are printed in the record. Copies of all of them, however, are included in plaintiff's Exhibit No. 1, the original of which has been sent up under the order of the District Court. (Record p. 789.) Three of the warrants are printed in the record as samples, and appear at pages 593, 594, 595 of the printed record. The warrant appearing on page 593 of the printed record shows on its face that it was drawn "for cruising". The warrant appearing on page 594 of the printed record shows upon its face that it was drawn for "cruising as per contract". The warrant appearing on page 595 of the printed record shows upon its face that it was drawn "for cruising timber". Each of the warrants in controversy is in the form of one of the three printed in the record. All of them sufficiently specify the liability for which they were drawn.

(b) The warrants do specify when the liability for which they were drawn accrued.

This court had before it the question of the validity of warrants of Bingham county, Idaho, in the case of *Bingham County vs. Nat. Bank of Ogden*, 122 Fed. p. 16. In that case the warrants in controversy were drawn in the years 1893 to 1896. This court held in that case that the warrants were

invalid because they did not specify when the liability for which they were drawn accrued. This case was followed by the Supreme Court of Idaho in the case of *McNutt vs. Lemhi Co.*, 84 Pac. Rep. 1054, 12 Idaho 63. The evident purpose of the statutory requirement that each warrant must show when the liability for which it was drawn accrued is to enable the treasurer to determine against the funds of what year the same are chargeable. The fiscal county system of Idaho is one which is designed, with certain exceptions which we have already discussed, to make the expenses of each year a separate charge against the revenues of that year and not otherwise.

Shaw vs. Statler, 15 Pac. Rep. 833 (Cal.).

McGowan vs. Ford, 40 Pac. Rep. 231 (Cal.).

The statute in question is in furtherance of this general object. Subsequent to the issuance of the warrants involved in the Bingham county case, and Lemhi county case, *supra*, the legislature of Idaho enacted additional legislation amending Section 2009 of the Revised Statutes of 1887. That statute before the amendment was as follows:

“All warrants issued by the auditor during each year commencing with the first Monday in January must be numbered consecutively, and the number, date, and amount of each, and the name of the person to whom payable, and the

purpose for which drawn, must be stated thereon, and they must at the time they are issued be registered by him."

As amended that section now appears as Section 2056 of Idaho Revised Codes, 1908, Vol. 1, and is as follows: (The italics are ours.)

"The auditor shall have prepared, in separate series, warrant blanks for each year. They must be numbered consecutively *and must show the year against the revenue of which they are to be issued.* He shall begin the use of a new series of warrants on the second Monday in April of each year. All warrants issued by the auditor shall be upon the warrant blanks *of the series for the year chargeable with the amount for which such warrant is issued,* and the number, date, and amount of each, and the name of the person to whom payable *and the purpose for which drawn must be stated thereon.* When the amount for which a warrant is to be drawn is greater than the sum of two hundred dollars, the auditor shall issue therefor warrants in sums of two hundred dollars or fraction thereof, unless there is cash in the county treasury in the fund against which such warrant is drawn for the payment of the same on presentation. All warrants must, at the time they are issued, be registered by the auditor."

This last declaration of the legislature prescribes the form in which the warrants must be drawn. The warrants sufficiently show when the liability for which they are drawn accrued, for they show the year against the revenue of which they

are to be issued in the manner required by Section 2056. This is made to appear by beginning the use of a new series of warrants on the second Monday of April in each year.

All warrants must be drawn upon the warrant blanks of the series for the year chargeable with the amount for which the warrants are issued.

The warrants in question were drawn upon forms prepared in accordance with the requirements of Section 2056, and they show upon their face that they are of the series of 1914.

In fact Section 2056 is complete in itself and fully covers the whole subject of the form of county warrants, and supersedes Sections 1955 and 2053, Idaho Revised Codes, Vol. 1. It covers precisely the same subject matter as was covered by the two sections last cited, and supersedes them upon the familiar principle that a later statute, complete in itself, impliedly repeals a prior statute covering the same subject matter.

But even if it should be held that Section 2056 does not supersede Sections 1953 and 2053, it at least declares the manner in which a warrant shall sufficiently show when the liability for which it was drawn accrued.

(D) THE CONTRACT WAS PERFORMED BY NEASE, THE DEFENDANT COUNTY ACCEPTED HIS WORK, DULY ALLOWED HIS CLAIMS THEREFOR, AND IS BOUND THEREBY.

(a) As the work progressed Nease filed with the board of county commissioners his report of the lands theretofore cruised by him, and his claims for payment for the same. These reports were examined by the board of county commissioners. (See testimony of following witnesses: Zelenka, Record pp. 355 to 357; Torgerson, Record p. 399; Harrison, Record p. 401.)

The claims were thereupon allowed by the board and warrants therefor issued to Nease. Section 1917 of the Idaho Revised Codes, Vol. 1, defines the powers of county commissioners, and subdivision ten thereof is as follows:

“To examine, settle and allow all accounts legally chargeable against the county, and order warrants to be drawn on the county treasurer therefor, and provide for the issuing of the same.”

Section 1947 of the above code is as follows:

“The board of commissioners must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and the amount claimed is justly due, is presented to the board

within a year after the last item of the account accrued.”

Nease's claims were properly made out and verified as required by law and filed. (See Plaintiff's Exhibit No. 4, Record p. 495; Plaintiff's Exhibit No. 5, Record p. 506; Plaintiff's Exhibit No. 6, Record p. 20; Plaintiff's Exhibit No. 5, Record p. 529.) Each of them shows by endorsement thereon that it was examined and allowed. The minutes of the meetings of the board also show that these claims were allowed. (See Plaintiff's Exhibit 8, Record p. 548.)

Paragraph 19 of the above Section 1917 of Idaho Revised Codes of 1908, enumerating the powers of county commissioners, is as follows:

“At the adjournment of each session of the board, to cause to be published such brief statement as will clearly give notice to the public of all its acts and proceedings, and, semi-annually, a statement of the financial condition of the county. Such statement, as well as all other public notices of proceedings of, or to be had before, the board, not otherwise specially provided for, must be published in some newspaper, printed and published in the county, as will be most likely to give notice thereof; and, when in a weekly paper, it must be published in at least two issues thereof, or in at least five issues when the paper is published oftener than weekly; but when there is no newspaper published in the county, copies of such statement

must be kept posted for at least twenty days in three public places in the county, one being in a conspicuous place at the courthouse door."

The proceedings of the board in allowing these claims were published as required by law. (Record p. 224.)

Section 1950 of the Idaho Revised Codes 1908, provides for an appeal by any taxpayer from any order of the board within twenty days after publication of the notice of the order of proceedings of the board. This section is as follows:

"Any time within twenty days after the first publication or posting of the statement, as required by Paragraph 19 of Section 1917, an appeal may be taken from any act, or order or proceeding of the board, by any person aggrieved thereby, or by any taxpayer of the county, when any demand is allowed against the county, or when he deems any such act, order or proceeding illegal or prejudicial to the public interests; and no such act, order or proceeding whatever, which directly or indirectly renders the county liable for the payment of the sum of Three Hundred Dollars or over, or its equivalent, shall be valid until after the expiration of the time allowed for appeal, or until such appeal, if taken, shall be finally determined; but there is excepted from the operation hereof all orders for the payment of those sums specially directed by law to be paid, or payments in fulfillment of acts or proceedings made and confirmed according to the provisions hereof."

No appeal was taken from the order of the board allowing any of the claims.

If the board had authority to make the contract with Nease, it had power, and it was its duty, to determine whether the contract had been performed to its satisfaction, and its determination of that question and allowance of the claim cannot be avoided except for fraud, mistake or failure of consideration.

Shirk vs. Pulaski County, Fed. Cas. 12,794, (4 Dillion, 209).

Board of Com'rs vs. Sherwood, 64 Fed. 107.

Thompson vs. Searcy County, 57 Fed. 1030.

Falls City Const. Co. vs. Monroe County, 208 Fed. 485.

City and County of Denver vs. Republican Pub. Co. (Colo.), 155 Pac. 311.

Ward vs. Barnum, 52 Pac. 412, (Colo.).

Advertisers & Tribune Co. vs. Detroit, 5 N. W. 72, (Mich.).

Morehouse vs. Clerk of Edmonds, 70 Wash. 152; 126 Pac. 419.

McConoughey vs. Jackson, 35 Pac. 863 (Cal.).

McFarland vs. McCowen, 33 Pac. 113 (Cal.).

State ex rel. Devine vs. Peter, 120 N. W. 896 (Minn.).

Com'rs Court vs. Moore, 53 Ala. 25.

The defense in this case, in so far as it chal-

lenges the proper performance of the contract, is in effect an attempt to reconsider the action of the former board in accepting the work and allowing the claims.

A subsequent board has no right to reconsider the action of a former board in allowing a claim.

County of Cook vs. Ryan, 51 Ill. App. 190.

State ex rel. Cummings vs. Curley, 17 So. Car. 563.

State ex rel. Clark vs. Cathers, 41 N. W. 182 (Neb.).

Board of Com'rs vs. Leonard, 34 Pac. 583 (Colo.).

Wayne County vs. Reynolds, 85 N. W. 574 (Mich.).

The decisions are practically unanimous on this point. (See note 21 L. R. A. (N. S.), page 291.) Not even the board allowing the claim can reconsider it after the warrant has been issued and sold to an innocent purchaser for value.

Eldorado County vs. Elstner, 18 Cal. 144.

Placer County vs. Campbell, 11 Pac. Rep. 602 (Cal.).

Colusa County vs. D. Jarnett, 55 Cal. 373.

Central Bank of Westchester Co. vs. Shaw, 106 N. Y. Sup. 94.

California decisions are particularly applicable, because the statute of Idaho giving power to county

commissioners was substantially taken from the California code.

The board of county commissioners is a tribunal with *quasi* judicial powers, and in passing on the claims acts judicially.

Gorman vs. County Com'rs, 1 Ida. 553.

Tilden vs. Sacramento Co., 41 Cal. 68.

The evidence does not show any facts to justify the court in holding that the county is not bound by the action of the board of county commissioners in allowing the claims. The District Court was of this opinion. (See Record, p. 186.)

The warrants were *prima facie* evidence of a valid indebtedness, and the burden of proving the facts to overcome the *prima facie* case rests on the defendant.

County of Apache vs. Barth, 177 U. S. 438; 44 L. Ed. 878.

Board of Com'rs vs. Home Savings Bank, 200 Fed. 35.

Rollins vs. Board of Com'rs, 90 Fed. 575.

Hubbell vs. City of South Hutchinson, 68 Pac. 52 (Kan.).

Ray vs. Wilson, 14 L. R. A. 773 (Fla.).

McQuillan, Municipal Corporations, Sec. 2258.

It is difficult at best to cite the record to show to the court the absence of evidence; and it is par-

ticularly so in this case. The conduct of the board in examining and allowing the claims will be found detailed by the following witnesses: Zelenka, Record pp. 355 to 357; Torgerson, Record p. 399; Harrison, Record p. 401.

The court will search the record in vain to find any evidence of fraud or artifice practiced on the board.

But even if it should be held that the acceptance of the work by the board of county of commissioners does not preclude inquiry into the character of the work, nevertheless the contract itself prevents the defendant county from successfully urging defective work as a defense to this action.

Nease, by paragraph 4 of the contract, was required to furnish a bond in the sum of \$10,000.00, conditioned that he would faithfully perform all of the terms and conditions of the contract, which bond was in force until the first day of October, 1915. (Record pp. 97 and 87.) Paragraph 7 of the contract is as follows:

“It is further stipulated and agreed, that all cruises that shall be rejected by the first party shall be corrected and the proper report and correct cruise of the land included therein shall be made by the second party accordingly as directed by the first party, and if the second party fails so to do, the first party shall have

the right to cause the same to be cruised and the reports accordingly as hereinbefore agreed to be made, and the cost and expense thereof above twelve and one-half cents per acre shall be paid by the second party to the first party on demand, and the payment thereof shall be secured by the bond filed herewith."

Under this paragraph of the contract the remedy of the county for any defective work is fixed. The work was completed in October, 1914. All of Nease's reports, in book form, were filed with the county. (Record p. 331.) Nease's bond was in force for a year thereafter, and the county had one year within which it had recourse to the bond for any failure on Nease's part, to correct the defective cruise. Moreover, it still has that remedy against Nease. Both parties to the contract knew that it was not to be performed by Nease in person, but to be performed by men hired by him and under his direction. It was impossible that their work should always be under his eye. The contract contemplated that there might be defective work. Provision therefor was made in the contract for the protection of both parties in case any such defective work should occur. We submit that after the county has once accepted Nease's work it cannot now, in the face of the plain provisions of the contract, refuse to pay for it, because of any defective work, if such there be, subsequently discovered, without first giv-

ing Nease an opportunity to correct the same.

And most certainly the whole claim is not bad even if some of the work should now be found to be defective.

(b) We think we have shown that if the county commissioners had authority to make the contract with Nease they, and they alone, had authority to pass upon the question of its proper performance, and that they have done so. If this is the law, then of course it is not for the court to substitute its judgment for that of the commissioners. If the commissioners had authority to contract for a cruise at all, it was for them to say what kind of a cruise would answer their purposes.

While we insist that the question of substantial performance by Nease under his contract has been foreclosed by the action of the board of county commissioners in accepting the work, and that all other evidence as to the character of the work is incompetent and immaterial, we will briefly call the attention of the court to the general character and nature of this evidence. One of the chief objections made to the character of the work is that some of the cruising was done by what is known as the "single run" method. The contract does not provide for any particular method of cruising. An adequate

reason, and no doubt the true reason, for this is that there are various methods for cruising timber. Some cruisers use one method and some another. Moreover, the same cruiser will use different methods, according to the character of the country and the timber; and the amount of experience a cruiser has had may determine whether he will use one method or another, in cruising a particular piece of land. See Bulletin 36 (Woodman's Handbook, issued by Department of Agriculture in 1912; especially pages 60, 64, 65 and 72. See also testimony of Fohl, a witness for the defendants. Record p. 316.) Cruising is not an exact science in any event, and "single run" cruising, by a competent man, is a general and well recognized method. (See testimony of Fohl, a witness for defendants. Record p. 317.) Of course, it is not so accurate as the "eight run" or "sixteen run" method used by Lacy and Company. This, however, is an unusual method, and its expense generally prohibitive. (Testimony of Croman, Record p. 449.) A description of the various methods of cruising may be found in the testimony of the following witnesses: Testimony Conry, Record p 425; Hamer, Record p. 431; Croman, Record p. 448.

"Single run" cruising is allowed in cruising

for the United States Government. (Record p. 433.)

The county employed one Wherry, a former employe of Nease, to recruise some of the lands cruised under the Nease contract, for the purpose of showing that Nease's work was inaccurate. Wherry made this cruise in company with one John Swanson and the result of their cruise, as compared with that of Nease, is shown by Defendant's Exhibit 4 (Record p. 596). Wherry's evidence in regard to this cruise appears at pages 256 to 272 of the record. He admitted that he had a hostile animus towards Nease, and his letters show that this was bitter. (Record pp. 267, 268; Plaintiff's Exhibits 11, 12, 13, Record pp. 552, 554, 556.) The witness Murray, at whose house Wherry lived for some time, testified that in his judgment a man having Wherry's animus toward Nease could not make an impartial check of Nease's cruise. (Record p. 386.) And this is necessarily so, because cruising is, after all, but an estimate based upon judgment. Under these circumstances it is probable that the Nease cruise was more nearly correct than Wherry's.

Notwithstanding the fact that Nease's cruise was completed in the fall of 1914 and this action was not tried until May, 1916, the defendant county

made no attempt to check the correctness of Nease's cruise except by Wherry, with Swanson working with him. They recruised 6,448 acres. (Record p. 269.)

The examination of Defendants' Exhibit Four (Record p. 596) shows that the timber on these lands was, in general, light, scattering and varied, giving the widest opportunity for difference in judgment, and especially where it was desired that such difference should exist.

Some claim was made by the defendants, and doubtless will be here, that some of the work was done hurriedly, and that several of the cruisers covered too much ground in a day. Some men can do more than others, and the amount that can be done depends largely upon the character, amount and quality of the timber, and especially upon the ease or difficulty with which the ground can be travelled. (Record pp. 428, 429, 433.) Some of Nease's cruisers on some days would cruise as much as 480 acres, and in one instance as much as 640 acres. This was not usual, however.

Theodore Fohl, a witness for the defendants, testified that he covered, in cruising for the Clear-water Timber Company, whose agent he was in

Clearwater County, from 160 acres to 640 acres per day. (Record p. 316.)

Moreover, Wherry and Swanson, when they were doing their cruising for the county to check some of Nease's work, to qualify themselves as witnesses in this suit, testified that they cruised 240 acres on most days, and on one day they had cruised 200 acres between 7:30 and 11:30 A. M. (Record p. 475.) It is to be supposed that Wherry and Swanson were trying to find all the timber they could. If the county's witnesses could properly cruise 200 acres (and double run it) before half past eleven A. M., we see no reason for supposing that a competent man could not, under favorable circumstances, occasionally cruise 640 acres, working long hours, as testified by the witness Olinger. (Record p. 429.)

All the cruisers employed by Nease were exceptionally competent men. All of them, with the exception of Snyder, had long experience in cruising, and were of the highest standing in the business. Not all of them could be produced as witnesses, but see testimony of the following:

Conry, Record p. 425.

Hamer, Record p. 431.

Clark, Record p. 440.

Penegor, Record p. 443.

Croman, Record p. 448.
Miller, Record p. 451.
Snyder, Record p. 457.
Hart, Record p. 458.
Kelley, Record p. 459.
Olinger, Record p. 459.
Johnson, Record p. 461.
Bennison, Record p. 463.
Dockery, Record p. 467.
Murray, Record p. 377.
Randolph, Record p. 247.

There is possibly one exception to the above. Morrow was found not to be uniform in his work and worked only 26 days during the spring and was not re-employed in the fall. See testimony of county's checker Gorman, Record p. 409; testimony of Morrow, Record p. 281; testimony of Nease, Record pp. 346 to 348.

(E) THERE WAS NO FRAUD IN THE MAKING OF THE CONTRACT.

Inasmuch as the trial court did not find that there was any fraud in the making of the contract, and in its opinion stated that there was no such fraud, it may be unnecessary for us to dwell upon this point. However, we shall call the court's attention to that part of the evidence which we under-

stand the defendants relied on to show such fraud.

(a) One circumstance was that the contract was let without advertisement. There is no statute of Idaho requiring an advertisement for bids. In the absence of such a statute, no such advertisement is required.

11 *Cyc.* 479, 480.

Dillon on Municipal Corporations, Vol. 2, p. 802, 5th Ed.

State ex rel. Huse et al. vs. Supervisors, 37 N. W. Rep. 936 (Neb.).

State ex rel. Gapen vs. Somers, 53 N. W. Rep. 146 (Neb.).

The failure of the commissioners to do something that the law does not require them to do is certainly no evidence of fraud.

(b) One other circumstance which was relied upon was the fact that other parties, Hunt and Rankin, offered to do the work at a lower price. Hunt's offer appears as Exhibit 3 of defendants' answer, found on page 47 of the record. The court will observe that his proposal was that the county itself should pay the cruisers' hire. His offer was that the cost should not exceed 10 cents per acre. The bond, however, that he proposed to give was not to be conditioned that the cost would not exceed that amount. If the county was to be liable to pay

the men hired by Hunt, it had no protection except Hunt's unsecured agreement that the cost might not greatly exceed the amount for which Nease agreed to do the work.

Rankin's offer appears as Exhibit 4 of defendants' answer, at page 51 of the record. He offered to do the work for seven and one-half cents per acre.

Both Hunt's proposition and Rankin's proposition were made to the board of county commissioners at the time the contract with Nease was made, Feb. 24, 1914. The board of county commissioners investigated Rankin and Hunt's responsibility before entering into the second contract with Nease, and they stated that they did not think that they were able to take the contract. (Testimony: Zelenka, Record pp. 358, 359; Harrison, Record pp. 299, 304, 305; Torgerson, Record pp. 398, 399.) Neither Rankin nor Hunt were witnesses at the trial nor was the deposition of either of them taken. Under the circumstances these offers of Rankin and Hunt are certainly not evidence of what is a reasonable price to be paid for such work as Nease agreed to do; nor evidence of fraud on part of Nease or the commissioners.

(c) There was some claim that the contract

price was excessive. There is no evidence to support this. It is the same price for which Nease was contracting to do similar work for other counties. (Record pp. 336, 337.)

(d) Some point was made of the fact in the trial court that Nease made too large a profit on his contract. This would be no evidence of bad faith in the making of the contract. Moreover, even if it were a fact that the county agreed to pay too much, that fact cannot now be considered by this court.

New Orleans vs. Warner, 175 U. S. 120.

Speer vs. Board of County Com'rs, 88 Fed., at p. 754.

(e) The board of county commissioners used much more care than is ordinarily exercised by such boards in investigating the responsibility of the contractor. (See testimony witness Zelenka, Record pp. 358, 359; testimony of witness Torgerson, Record pp. 398, 399.) Zelenka and Torgerson were members of the board of county commissioners.

Nease was engaged in the business of timber cruising by contract, and had been employed to do like service by counties in the States of Oregon and Washington, and also for other counties in the State of Idaho. (Testimony Nease, Record p. 336; testimony Zelenka, Record pp. 353, 354.)

(f) One circumstance that was alleged and proved by the defendants was the bringing and pendency of a certain suit by one John Lewis. The complaint in the Lewis suit is shown as Defendants' Exhibit No. 21, at page 648 of the record. That action was a suit in equity to restrain the performance of the contract between Nease and the county, dated February 24, 1914. This was not the contract in controversy in the suit at bar. The same plaintiff, John Lewis, appealed to the District Court of the Second Judicial District of Idaho from the order of the board of county commissioners, entering into the second contract with Nease, which is the one in controversy in this suit. The first mentioned of these proceedings, i. e., the suit in equity, was pending until the 14th day of October, 1914, when it was dismissed (Record p. 106.) Lewis' appeal was also dismissed about the same time (Record p. 342). There is no evidence to show that this appellant or Nease had anything to do with instituting or delaying the disposition of either of these actions; in fact, the evidence is quite to the contrary. (See testimony of Nease, Record p. 334; Tannahill, Record p. 464; Beckett, Record p. 463.)

Lewis had no interest in this suit. It was instituted at the request of Mr. Fohl, the agent of the

Clearwater Timber Co., and dismissed at his request. (Record p. 319.)

SPECIFICATIONS OF ERROR NOS. III, IV AND VII.

These three specifications of error may be argued together.

Specification No. III is that the court erred in refusing to enter a decree adjudging that the claims filed by Nease for work performed under the contract, and allowed by the county commissioners, were each and all valid debts against the defendant county.

Specification of error No. IV is that the court erred in failing and refusing to enter a decree against the defendant county in favor of the appellant for and on account of the work performed by Nease under the contract in the sum of \$49,561.99, that being the amount of the allowed claim with interest to the date of the entry of the decree.

Specification of error No. VII is that the court erred in refusing to enter a decree for the plaintiff and against the county for the above amount.

We have already presented the grounds upon which, in our opinion, the court was bound to hold

that the claims filed by Nease were valid claims against the county, and that Nease was entitled to be paid for his work.

The additional argument that we desire here to make relates to the question of what decree the court should render in case it should hold that the warrants were defective in form because not sufficiently specifying the liability for which they were drawn and when it accrued.

(a) Under the pleadings in this case the court will not deny this plaintiff relief even though it should hold that the warrants are defective in form. The Bingham County case, *supra* (122 Fed. 16), was an action at law brought upon the warrants, and that case was brought before equitable relief could be had in an action at law in the Federal court. The case at bar is in equity. The defendant, by its answer, challenged the validity of the contract between Nease and Clearwater County, and the validity of the debt for which the warrants were issued, and prayed that the contract be declared cancelled; that the warrants be delivered for cancellation, and that the county be decreed not liable by, for, or on account of the issuance of said warrants. (Record pp. 43-44.)

The reply of the plaintiff met the issue so ten-

dered, and prayed that the warrants be decreed to be valid warrants of Clearwater County, and that the plaintiff be decreed to have a valid and subsisting claim against the defendant county for the amount for which the warrants were issued. (Record pp. 168-169.)

While the bill of complaint is for an injunction against the treasurer, the county itself was made a party to the end that it, in its corporate capacity, might set up any defense that it might have to the payment of the warrants in order that if it elected so to do the whole controversy might be determined in this action. It did so elect, and properly so. The case was tried upon all the issues so tendered.

If Nease was entitled to be paid for the performance of his contract it would now be the height of injustice to deny this appellant relief because the county has failed to issue to Nease the kind of a warrant which, under the law, Nease was entitled to receive.

(b) The assignment of the warrants carries the right to recover on the original claim if the warrants should be invalid in form.

Chelsea Sav. Bank vs. City of Ironwood, 130 Fed. 410.

Board of Com'rs vs. Irvine, 126 Fed. 689.

Geer vs. School Dist. No. 11, 111 Fed. 682.

Skirk vs. Pulaski County, Fed. Cas. No. 12,794.

First National Bank of New York vs. Cook, 61 N. W. 693 (Neb.).

Dana vs. City of San Francisco, 19 Cal. 486.

Citizens Savings & Loan Ass'n vs. Belleville & S. I. R. Co., 117 Fed. 109.

Fernald vs. Town of Gilman, 123 Fed. 797, same case 141 Fed. 941.

Louisiana vs. Wood, 102 U. S. 294.

McQuillan, Municipal Corporations, Sec. 2251.

Where a bond or warrant is invalid but the claim valid, a judgment under proper pleadings may be rendered on the original liability.

Town of Gilman vs. Fernald, 141 Fed. 941, 944.

Board of Com'rs vs. Irvine, 126 Fed. 689, 693.

Geer vs. School District No. 11, 111 Fed. 682, 690.

Under Equity Rule 23 the court will render a judgment settling the entire controversy.

Franey vs. Warner, 71 N. W. 81, 86 (Wis.).

The county having received and retained the fruits of the contract cannot shield itself by a plea of irregularities.

City of Des Moines vs. Wellsbach Street Lighting Co., 188 Fed. 906.

(c) If necessary, this court would reform the warrants or direct that the defendant county issue to the appellant warrants proper in form. But this is unnecessary because the county itself is before the court. It is the real party in interest, and its only interest is in the question whether it is liable to pay the claim for which the warrants were issued. The objection to the form of the warrants touches only the manner of getting the money out of the treasury. The county itself being before the court, the judgment will protect the disbursing officer.

(d) If the county commissioners had authority to make the contract, and accepted the benefits of the work, they must pay for it.

Wycoff vs. Strong, 25 Ida. 502.

S. C. 144 Pac. 341.

Campbell vs. Hildebrand, 3 S. W. 243 (Tex.).

That they have accepted the benefits of the work is shown by the fact that they still retain the plat books and reports which Nease supplied them in accordance with his contract. The county has used his work in making assessments. (Record pp. 303, 402, 403.)

The county got the benefit of the cruise in increasing the taxable property of the county. (Tes-

timony of Torgerson, Record p. 399.) Before the completed cruise was all available it brought about \$3,000,000 of increased value on the tax rolls. The taxes of two timber companies only were increased \$37,000 and others in the same proportion. (Testimony of Blake, Record pp. 416, 417.)

The county also used the cruise before the State Board of Equalization with its approval. (Record pp. 309, 310, 417.)

(e) It may be urged that the defendant county has a right to a trial by jury of the question of its liability. The case has been tried as one of equitable cognizance, and it is too late now to contend that the court cannot try all the controversies raised by the pleadings.

Municipal Sec. Co. vs. Baker County, 54 Pac. 174 (Or.).

O'Hara vs. Parker, 39 Pac. 1004 (Or.).

Beyer vs. Le Fevre, 186 U. S. 114, 46 L. Ed. 1080.

Reynes vs. Dumont, 130 U. S. 354, 32 L. Ed. 934.

Kilbourn vs. Sunderland, 130 U. S. 505, 32 L. Ed. 1005.

Southern Pac. R. Co. vs. United States, 200 U. S., at p. 352, 50 L. Ed. 511.

The act of Congress of March 3, 1915, "sub-

stantially abolished the technical distinctions between proceedings in law and equity.”

United States vs. Richardson, 223 Fed. 1010.

Since the issues were tried before the court sitting as a court of equity it is now immaterial whether the case be considered as one at law or in equity.

United States vs. Illinois Surety Co., 226 Fed., p. 653.

See especially petition for rehearing, pp. 663 and 664.

Collins vs. Bradley Co., 227 Fed. 199.

National Surety Co. vs. United States, 228 Fed. 577.

By asking for equitable relief the defendants are estopped from claiming that the suit is not one of equitable cognizance.

Municipal Sec. Co. vs. Baker County, 54 Pac. 174 (Ore.).

O'Hara vs. Parker, 39 Pac. 1004 (Ore.).

Beyer vs. Le Fevre, 186 U. S. 114.

Reynes vs. Drumont, 130 U. S. 354.

Kilborn vs. Sunderland, 130 U. S. 505.

S. P. Co. vs. U. S., 200 U. S. 341.

SPECIFICATIONS OF ERROR NOS. V AND VI.

These two specifications can be argued together. Specification of error No. V is that the court erred in not enjoining the defendant treasurer from paying out of the warrant redemption fund warrants registered subsequent to the registration of appellant's warrants.

Specification No. VI is that the court erred in refusing to decree that the treasurer be required to pay and call all warrants out of the warrant redemption fund in the order of their registration.

Section 1955 of Idaho Revised Codes, Vol. 1, *supra*, requires that all warrants be presented to the county treasurer, and if not paid, registered; and thereafter paid in the order of their registration. Appellant's warrants were presented and registered. (Record p. 221.)

(a) If the warrants were valid, injunction was the proper remedy.

E. H. Rollins & Sons vs. Board of Com'rs,
199 Fed. 71, see p. 79.

President, etc., of Yale College vs. Sanger,
62 Fed. 177.

Cunningham vs. Macon, etc., R. R. Co., 109
U. S. 446, 27 L. Ed. 993.

Hagood vs. Southern, 117 U. S. 52; 29 L. Ed.
805.

Hans vs. State of Louisiana, 134 U. S. 1; 33 L. Ed. 842.

Pennoyer vs. McConnaughty, 140 U. S. 1; 35 L. Ed. 363.

Mutual Life Ins. Co. vs. Boyle, 82 Fed. 705.

Starr vs. Chicago, R. I. & P. Ry. Co., 110 Fed. 3.

Southern Ry. Co. vs. Greensboro Ice & Coal Co., 134 Fed. 82, p. 93.

(b) It was contended before the District Court by the defendant that the treasurer could not be compelled to pay the appellant's warrants because no certified list of the claims allowed and for which the warrants were issued had ever been filed by the county commissioners with the county treasurer as required by the statute. The statute in question is Section 1943 of Idaho Revised Codes, Vol. 1, and is as follows:

"SEC. 1943. The board must require their clerk, at the close of every session, to furnish them with a list of all bills and accounts of every nature approved by them at said session, giving the name of each person in whose favor an account or bill of any kind or nature has been allowed, with the amount allowed him and out of what fund the same is to be paid. They must compare their list with the record of their proceedings, and if not found correct, make it so and certify to said list and file it with the county treasurer, and the treasurer must pay no warrant drawn on any fund in the

county treasury that does not correspond with the files furnished him by the board.”

The evidence on this point is as follows: Oren D. Crockett, the defendant treasurer, when called as a witness for the defendant, produced in court the book used by the board of county commissioners of the defendant county for the year 1914, and which they furnished to the treasurer to show the claims allowed by the board. The book contains a list of the claims allowed for which the warrants in controversy were issued but such list is not certified. The following warrants of the appellant's were not listed: 7331 to 7339 inclusive, and warrants numbered 7343, 7596, 7597, 7598, 7599 and 7656.

It appears that claims of other parties were allowed and warrants issued therefor for which no certified list was given to the county treasurer, showing that the county officials, from carelessness or other cause, did not always comply with the requirements of the statute. (Record p. 226.)

It appears that the county commissioners did furnish to the treasurer a list of the Nease claims allowed, with the exception of 15 of the warrants, but that the same was uncertified. It is contended that the treasurer cannot be compelled to recognize

appellant's warrants because no certified list has been furnished him by the commissioners. It will be noted that the warrants were presented to the treasurer; stamped by him "not paid for want of funds," and thereafter registered by him. (Record p. 221.)

The treasurer, after appellant had purchased the warrants, corrected his registration stamp on two of them at the request of the appellant. (Record p. 221.)

The object of the above statute is plain. It gives the treasurer a check on the auditor, and insures that the treasurer will not pay any warrants that have not been allowed by the board of commissioners. It certainly would be absurd to hold that the county, after having accepted a contractor's work, and allowed his claim, and issued warrants to him for the same, could avoid payment because of the neglect of its commissioners to file a certified list with the treasurer.

It may be that if the county itself were not a party to this action, the treasurer could object to being compelled to pay warrants until the certified list was filed with him. But the court will recognize that the object of the statute is to protect the county

against the payment of unallowed claims. The lack of a certified list does not make the warrants invalid. It simply requires that the treasurer do not pay them until evidence is filed with him that the claims for which the warrants were drawn have been allowed.

There were filed as exhibits in this case the records of the board of county commissioners showing that the claims had been allowed. (Plffs. Exhibit 4, Record p. 495; Plffs. Exhibit 5, Record p. 506; Plffs. Exhibit 6, Record p. 520; Plffs. Exhibit 7, Record p. 529; Plffs. Exhibit 8, Record p. 548.) This is sufficient. The county itself is a party defendant to this action, and the judgment of the court will protect the treasurer in making payment.

The mere fact that the county officers have neglected to do their duty in keeping proper records, as between themselves, would not justify the county treasurer in dissipating the funds applicable to the payment of the appellant's warrants if they were legally issued.

Sims vs. Milwaukee Land Company, 20 Ida. 513.

S. C., 119 Pac. 37.

Speer vs. Board of County Com'rs, 88 Fed., at p. 757.

*City of Des Moines vs. Wellsbach Street
Lighting Co.*, 188 Fed. 906.

Moreover, when the county commissioners delivered to the treasurer the list of allowed claims for the purpose of informing him as to what claims had been allowed, their action was sufficient certification.

SPECIFICATIONS OF ERRORS VIII, IX, X, XI, XII,
XIV, XV, XVI, XVII, XVIII.

Each of these specifications allege error by the court in the admission of evidence. All such evidence was admitted for the purpose of showing either:

(a) Defects in Nease's work (See Specifications of Error Nos. VIII, IX, X, XI, XII, XVI, XVII),
or

(b) The amount which it cost Nease to do the work (See Specifications of Error Nos. XIV, XV).

We have already shown that the accepting of the work by the board of county commissioners precludes inquiry in this suit into the correctness of Nease's work.

We have already shown in arguing specification of error No. II that the cost of the work to Nease is immaterial.

We recognize the rule that in an equity case the decree will not be reversed on appeal because of the admission of improper evidence, if there is sufficient proper evidence in the record to sustain the decree. We insist upon the errors in the admission of testimony for the purpose of preserving in this court the objection to such evidence, and confining the inquiry by this court to proper evidence.

It is respectfully submitted that the decree of the lower court should be reversed with directions to the lower court to enter a decree granting the prayer of the appellant as made in its bill of complaint, and in its reply, adjudging that each and every warrant described by the appellant in its bill is a valid and subsisting warrant of Clearwater County according to the amount and tenor thereof, and enjoining the defendant treasurer of said county from paying out of the warrant redemption fund of said county any warrants of said county registered by the treasurer of said county subsequent to the registration of any unpaid warrants of the appellant, and enjoining the treasurer of said county from paying out of the said warrant redemption fund any warrants of said county except in the order the same have been registered by the treas-

urer of said county until all of the appellant's warrants have been paid.

In case this court should hold that any of said warrants are invalid because insufficient in form, this appellant asks that such warrants be reformed or in lieu thereof that appellant have judgment against the defendant county for the amount thereof.

In case this court shall hold that any part of the claim for which said warrants were issued is invalid, this appellant asks that it have relief as above prayed for so much of its claim as shall be held by this court to be valid; and plaintiff prays for such other and further relief as to this court may seem meet and equitable in the premises.

PETERS & POWELL,

H. B. BECKETT,

GEORGE W. TANNAHILL,

Attorneys for Appellant.

APPENDIX I.

CHAPTER 58 OF THE SESSION LAWS OF IDAHO FOR THE
YEAR 1913 REGULATING THE ASSESSMENT AND
TAXATION OF PROPERTY.

SECTION 2. "All real and personal property subject to assessment and taxation must be assessed at its full cash value for taxation for state, county, city, town, village, school district and other purposes. * * *"

SECTION 6. "Real property for the purposes of taxation shall be construed to include land, and all standing timber thereon, including standing timber owned separately from the ownership of the land upon which the same may stand. * * *"

SECTION 15. "In ascertaining the value of any property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion any value or price for which the property would sell at auction or at forced sale, or in the aggregate with all the property in the taxing district; nor, on the other hand, shall he adopt a speculative valuation, or one based upon sales made upon the basis of a small cash payment and installments payable in the future, but he shall value each article or piece of property by itself and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made."

SECTION 34. "The assessor must have prepared a full, accurate and complete plat-book of his county, in which shall be platted all townships and fractional townships which have been officially surveyed and platted by the United States government;

such plats to be made in a draftsmanlike manner on a scale of four inches to the mile. All lands in the county upon which final proof has been made, or which have been approved for patent, shall be platted thereon in such manner as to correspond with the technical description of such lands as described by the government survey thereof, and on each of such tracts shall be entered the assessed valuation thereof and the name of the present owner. * * * It is hereby made the duty of the assessor to ascertain all changes in the ownership of land in his county from time to time, and make the proper changes in the names of the present owners in his plat-book. All necessary and reasonable expense incurred by the assessor in complying with the provisions of this section shall be a legal claim against the county."

SECTION 38. "On or before the fourth Monday of June after the passage and approval of this act, the register of the State Board of Land Commissioners must furnish to the assessor of each county in this state, without fee, upon blanks to be supplied by the state auditor, a complete list duly certified, of all lands in such county sold by the state, and on the second Monday of January, annually thereafter, furnish to such assessor a certified list of all lands in such county which have been sold, or on which payments have been made, or to which the state has issued its deed, since the last list was furnished. Such lists shall show all lands or timber in the county for which the state has issued its deed or certificate, the selling price of all lands in the county sold on contracts providing for the payment thereof in installments, and the amount of the principal of such selling price which has been paid at the date of such lists. The register of the State Board of Land Commissioners shall be liable upon his official bond for all taxes lost on

account of his failure to furnish the lists as herein provided, to be recovered in an action brought by the county attorney of the county affected, in the name and for the benefit of such county. Any amount so recovered shall be apportioned as other taxes levied for the year in which such property escaped assessment."

SECTION 39. "The assessor must assess all real property in his county, subject to assessment by him, between the second Monday of January and the fourth Monday of June in each year and must complete such assessment on or before the said fourth Monday of June. In making such assessment the assessor shall actually determine, as near as practicable, the full cash value of each tract or piece of real property assessed, and shall enter the value thereof, and the value of all improvements thereon * * * in appropriate columns against the description of such real property in the real property assessment roll. The tax levies shall be extended on the aggregate valuations of said property, real and personal, after deducting the amount of any exemptions allowed, and any personal property so entered upon the real property assessment roll must not be entered upon the personal property assessment roll."

SECTION 48. "For purposes of assessment lands shall be classified as follows:

Lands outside of cities, towns, villages or town-sites:

A. Agricultural land, being land used or susceptible of use for general agricultural purposes, including land in use or susceptible of use for orchard or vineyard purposes, and land used or susceptible of use for scientific dry farming.

B. Timber land, being land on which there

is standing timber of commercial quantity and quality.

C. Cut-over and burnt timber land, being land from which timber has been cut or burned, leaving nothing but stumps and burnt timber, and which burnt timber is not at the time of the assessment useful for any commercial purpose. Where timber land is held under separate ownership from the timber thereon the land itself shall be classified under this heading.

D. Mineral land, being land used or susceptible of use for mining.

E. Grazing land, being land not used or susceptible of use for agricultural purposes and which is useful only in large areas for stock grazing.

F. Waste land, being land not susceptible of use for agricultural or commercial purposes. * * *

SECTION 49. "The classification provided for in the preceding section shall be entered against the description of all land in separate columns on the real property assessment roll, showing the number of acres of land and the value thereof *in each class of land* outside of cities, towns, villages or townsites and the value of each class of land in cities, towns, villages and townsites. The assessor shall exercise his best judgment in classifying land in accordance herewith, but the classification made by him may be amended or revised, and a new classification made, or the classification of any particular tract or lot changed by the board of county commissioners, if in the judgment of such board such land has not been correctly classified in accordance with the provisions of the preceding section."

SECTION 50. "In case standing or growing timber is owned separately from the ownership of the land on which it stands or grows, such timber shall

be entered upon the real property assessment roll separate and apart from the land, and the number of acres and the value thereof entered in columns provided for that purpose."

SECTION 53. "The assessor must complete the real property assessment roll on or before the fourth Monday of June in each year, and must, on or before said date, deliver the completed real property assessment roll, together with all taxpayer's statements and claims for exemption relating to the assessments entered thereon, to the clerk of the board of county commissioners. The said assessment roll, taxpayer's statements and claims for exemption, must remain in the office of the said clerk until the meeting of the said board as a board of equalization, for the inspection of all persons interested."

SECTION 55. "The board of county commissioners of each county in this state shall meet as a board of equalization on the first Monday of July in each year, and shall continue in session from day to day up to and including the fourth Monday of July in said year for the purpose of equalizing the assessment of all property entered upon the real property assessment roll. * * *"

SECTION 56. "It is hereby made the duty of the board of county commissioners, at the meeting prescribed in the preceding section, to enforce and compel a proper classification *and assessment* of all property required under the provisions of this act to be entered upon the real property assessment roll, and in so doing the board shall examine such roll, tract by tract, and name by name and the valuation of each item of property assessed, and shall raise or cause to be raised, or lower or cause to be lowered, the assessment of any property which,

in the judgment of the said board, has not been assessed at its full cash value. The board must determine all complaints in regard to the assessed value of any property entered upon said roll, and must, except as prohibited in this act, correct any valuation entered upon said roll by adding thereto or subtracting therefrom such amount as may be necessary in order to make such valuation, conform to the full cash value, and must correct any assessment by adding to or subtracting from the amount, number, quantity or value of any property assessed, when a false, inaccurate, or incomplete taxpayer's statement has been rendered. * * *"

SECTION 58. "All changes in assessments and all new assessments ordered by the board of county commissioners, shall be entered in the assessment roll by the clerk of the said board, in the presence and under the direction of said board, and any assessment so changed or entered has the same force and effect as if made and entered by the assessor before the completion of the assessment roll."

SECTION 61. "The assessor must attend all meetings of the board of county commissioners in session as a board of equalization, and may make any statements, or introduce testimony and examine witnesses on questions before the said board relating to the assessment."

SECTION 62. "The board of county commissioners in session as a board of equalization may require the attendance of the county recorder, who must furnish the said board with any information which may be had from the records in his office and which the said board may deem necessary in equalizing the assessment, and may also require the attendance of any other county officer or deputy whose testimony may be needed, and may also sub-

poena witnesses and hear evidence in all matters relating to the assessment of property, and may arbitrarily value and assess the property of any person refusing to appear or testify, and any assessment so made shall be conclusive on all questions of valuation and assessment in any court or proceeding."

SECTION 64. "Any member of the board of county commissioners who knowingly permits any assessment to stand, or permits any alteration to be made in the assessment roll, whereby any property is assessed at more or less than its full cash value, shall be guilty of a misdemeanor and of malfeasance in office, for which he may be removed from office in the manner provided by law for the summary removal of public officers from office."

SECTION 211. "Any county officer upon whom any duties devolve under this act, or under the revenue laws of this state, who wilfully neglects or refuses to perform any such duty, or who performs them in a careless or incompetent manner, may be removed from office in the manner prescribed by law, and when proceedings are commenced to remove such officer from his office, the board of county commissioners, or in case such officer be a commissioner, then the probate judge, may suspend such officer from his powers and duties under the revenue laws, and appoint a competent person in his place until a proper tribunal has either removed or acquitted such suspended officer. * * *"

SECTION 65. "The clerk of the board of county commissioners must record all proceedings of the said board relating to the equalization of assessments, the allowance of exemptions, and all changes, corrections and orders made by the said board, and the names of all persons who have appeared

before the said board and who have been heard upon matters affecting the assessment of property, and a minute of all notices which have been mailed in accordance with Section 63 of this act, in the 'Minute Book' provided for in Section 1912 of the Revised Codes of Idaho."

SECTION 66. "On the fourth Monday of July the board of county commissioners must deliver the real property assessment roll, with all changes, corrections and additions entered therein, to the county auditor, who must add up the columns of amount and value of each kind and class of property, and of all property, and prepare an abstract of all the property entered upon said roll * * * showing the total number of items or pieces of property and the total value thereof, in each class the number of acres, average value per acre, and the total value of each class of land, the total value of each class of improvements on land, the total number and value of each kind of the different classes of livestock and the amount and value of each class of other property as shown in separate columns in the assessment roll * * * as determined by the board of county commissioners. The said abstract must be prepared in duplicate and duly verified upon blanks supplied by the state auditor, and must show a correct classification of all the property in accordance with the classification of such property upon the assessment roll, and all matters and things required to be shown upon said abstract must be entered in the proper spaces and columns provided for that purpose in the said blanks."

SECTION 68. "Any assessor who shall wilfully or knowingly enter, or suffer to be entered, any untrue or incorrect classification of land or other property upon the assessment roll; or any member of

any board of county commissioners who shall knowingly permit any such untrue or incorrect classification of property to stand, or any county auditor who *knowingly* makes an untrue or incorrect classification of the property, as entered upon the assessment roll, in his abstract of the assessment, or fail to transmit his abstract of the assessment within the time prescribed therefor in the preceding section, shall forfeit the sum of one thousand dollars, to be recovered upon his official bond for the use of the state."

SECTION 1586 OF THE IDAHO REVISED CODES CONCERN-
ING THE TAXATION OF STATE LANDS SOLD
UNDER CONTRACT.

SECTION 1586. "All lands sold under the provisions of this chapter shall be exempt from taxation for and during the period of time in which the title to said land is vested in the State of Idaho, but the value of the interest therein of the purchaser may be taxed, which interest shall be determined by the amount paid on such land and the amount invested in improvements thereon at the date of such assessment."

APPENDIX II.

SECTIONS 3586, 3605, 3608 AND 3609, LORD'S

OREGON LAWS.

SECTION 3586. "The assessor after qualifying shall, on the first Monday in March, in each year, procure from the county clerk a blank assessment roll, and forthwith proceed and assess all taxable property within his county, except such as by law is to be otherwise assessed, and shall return to such county clerk on or before the third Monday in October next following, such assessment roll with a full and complete assessment of such taxable property entered thereon, including a full and precise description of the lands and lots owned by each person therein named, on March first of said year, at the hour of one o'clock A. M., which description shall correspond with the plan or plat of any town laid out or recorded; and said lands or town lots shall be valued at their true cash value, taking into consideration the improvements on the land and in the surrounding country, the quantity of the soil, its convenience to transportation lines, public roads, and other local advantage of a similar or different kind. True cash value of all property shall be held and taken to mean the amount such property would sell for at a voluntary sale made in the ordinary course of business, taking into consideration its earning power. No deduction of indebtedness from assessments or taxation shall be allowed in any case. All land shall be taxed in the county in which the same shall lie; and, except as otherwise provided by law, every person shall be assessed in the county where he resides at the hour of 1 o'clock A. M., on March first of the year when the assessment shall be made for all real and personal property owned by him within such county,

but if the owner of any land be unknown, such land may be assessed to 'unknown owner,' or 'unknown owners,' without inserting the name of any owner; but no assessment shall be invalidated by a mistake in the name of the owner of the real property assessed, or by the omission of the name of the owner, or the entry of a name other than that of the true owner, if the property be correctly described; and provided further, that where the name of the true owner, or the owner of record, of any parcel of real property shall be given, such assessment shall not be held invalid on account of any error or irregularity in the description; provided, such description would be sufficient in a deed of conveyance from the owner; or on account of any description upon which, in a contract to convey, a court of equity would decree a conveyance to be made."

SECTION 3605. "Each assessor shall give three weeks' public notice in some newspaper printed in his respective county; if there be no such newspaper, then by posting up notice in six conspicuous places in his county, setting forth that on the third Monday in October the board of equalization will attend, at the court house in his county, and publicly examine the assessment rolls, and correct all errors in valuation, description or qualities of lands, lots or other property assessed by such assessor; and it shall be the duty of persons interested to appear at the time and place appointed. Proof of such notice, if published in a newspaper, shall be made by affidavit as provided by law, filed with the clerk of the county where the newspaper is printed, on or before the third Monday in October in the year when such notice is printed; if such notice be posted, proof thereof shall be made by the affidavit of the assessor or his deputy, setting out the

time, manner and place of posting such notices, filed with the clerk of the county on or before the third Monday in October in the year when such posting is made."

SECTION 3608. "If it shall appear to such board of equalization that there are any lands or lots or other property assessed twice, or incorrectly assessed as to description or quantity, and in the name of a person or persons not the owner thereof, or assessed under or beyond the actual full cash value thereof, said board may make proper corrections of the same. If it shall appear to such board that any lands, lots or other property assessable by the assessor are not assessed, such board shall assess the same at the full cash value thereof."

SECTION 3609. "Said board of equalization shall not increase the valuation of any property on such assessment roll, as provided in the preceding section, without giving to the person in whose name it is assessed at least five days' notice to appear and show cause, if any he has, why the valuation of his assessable property, or some part thereof, to be specified in such notice, shall not be increased; provided, that such notice shall not be necessary if the person appear voluntarily before said board, and be there personally notified by a member thereof that his property or some specified part thereof, is, in the opinion of the board, assessed below the actual value; and provided further, that such notice shall not be necessary in event the board deem it necessary to increase the valuation of all property upon such rolls, in a certain proportion, in order that the valuation of the property generally upon the rolls shall be its full cash value, as by law required. Petitions or applications for the reduction of a particular assessment shall be made in writing, verified

by the oath of the applicant or his attorney, and be filed with the board during the first week it is by law required to be in session, and any petition or application not so made, verified, and filed shall not be considered or acted upon by the board."

IN THE
United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DEXTER HORTON TRUST &
SAVINGS BANK,

Appellant,

vs.

THE COUNTY OF CLEARWATER
of the State of Idaho, and OREN
D. CROCKETT, as Treasurer of
said County,

Appellees.

NO. 2968

Appeal from the United States District Court, Dis-
trict of Idaho, Central Division.

BRIEF OF APPELLEES.

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FILED

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NO. 2968

APPELLEE'S BRIEF

STATEMENT.

In the fall of 1913, the assessors of four counties in Northern Idaho held a meeting, at which meeting the question of cruising timber was discussed (Tr. 302). Patrick Blake testified (Tr. 414).

"In discussing this question of valuations on timber lands, the brief result of the meeting was this, that we, the assessors who attended that meeting would return to our several counties and report what action had been taken, and

try and urge our county commissioners to cruise at least a portion of the timber lands in our several counties. I did that."

The assessors thereupon returned to their respective counties with the idea of urging upon their commissioners the desirability of having a portion of the timber lands in the county cruised. What was to be done; how it was to be done; and how the cost was to be met, were vague, uncertain and unsettled questions. No definite plan had been agreed upon. The Idaho tax commission, which had authority under the laws to "prescribe a uniform system of procedure in the assessment of property" had not called upon any of the counties to have a cruise made and had made no recommendations to any county assessor that a cruise be made. The assessors in each of the four northern counties went home, each evidently with the idea of working out his own plan. Latah county had about 4000 acres cruised. Kootenai county entered into a contract for the cruising of timber, but the contract was held void by the judge of the district court on the ground that it would create an indebtedness in excess of the revenue of the county for the fiscal year in violation of the constitution of the state of Idaho. No appeal from this decision was taken and the cruise was abandoned.

The officers in Clearwater county, however, more determined that the others, insisted upon having a cruise made, and the county assessor appeared before the board of county commissioners and demanded that they let a contract for the cruising of timber or he would take the matter in hand himself. The county commissioners held a meeting February 24th, 1914, and without the preparation of plans or specifications, or in reality having any distinct idea themselves as to what they wanted or how they wanted it done, but conscious of the fact that they did not have the money to pay for the work, entered into a contract with M. G. Nease, of Portland, Oregon, whereby Mr. Nease was to cruise three townships in Clearwater county. Under this contract Mr. Nease brought about thirty men, non-residents of the state of Idaho, into Clearwater county and began the work of cruising timber.

April 3, 1914, one of the timber companies, in the name of John Lewis, commenced an action in the district court against M. G. Nease, the county commissioners and other officers, and sought to enjoin the performance of the contract on the following grounds among others:

(a) that none of the men were assessors or deputy assessors, and that the board had not complied with the laws of the state of Idaho with

reference to the appointment of deputy assessors; and,

(b) That the cost of the cruise would create an indebtedness in excess of the income and revenue provided for the county for the fiscal year in direct violation of the constitution of the state of Idaho.

All of the moving papers were served upon the defendants on the 13th day of April, 1914, whereupon Mr. Nease and the county board, on the 15th day of April, 1914, voluntarily and by mutual consent, abandoned the contract of February 24th; and, notwithstanding the fact that their attention had been called to the invalidity of the proposed contract, and without attempting to follow the provisions of the law in any respect with reference to the appointment of deputy assessors, and without making any provision to pay for the cost of the work, the county entered into a new contract on the 15th day of April, 1914, with M. G. Nease for the cruising of all of the timber land in Clearwater county at the price of twelve and a half cents per acre.

Peace was soon made with the timber companies, and no further action was taken by them in the John Lewis suit, which suit was, according to agreement dismissed October 13th, 1914. The cruise was fin-

ished about the 1st of November, 1914, and warrants drawn aggregating approximately \$63,000.00.

Much dissatisfaction arose over the cruise, and at the election held in 1914, entirely new county officials were elected. They took office January 11, 1915. Investigation on behalf of these officials disclosed that the work had been fraudulently performed; that deceit had been practiced upon the county in securing warrants for the cruising of land not covered by the contract; that other counties in the state were not having cruises made; that no funds were in the treasury with which to pay the Nease warrants, and that an indebtedness had been created in excess of the income and revenue of the county for the fiscal year in violation of the provisions of the state constitution; and, therefore, upon these grounds, payment of the warrants was refused.

M. G. Nease had transferred to the Ehrhardt Investment company warrants in the amount of \$18,926.99 which warrants were called and paid the Saturday preceding the Monday before the old officials retired from office. Thereupon Mr. Nease transferred the balance of the warrants to Dexter Horton Trust & Savings Bank, of Seattle, and this corporation brought suit December 27th, 1915. The

case came on for trial May 8th, 1916, and continued for a week. Decision was rendered July 29th, 1916, in favor of the defendants. Decree dismissing the suit was filed September 11th, 1916, from which decree the present appeal was taken.

With the hope that it may be of some assistance to the court, the following names of witnesses are given together with their relation to the case:

COUNTY COMMISSIONERS, Frank Zelenka, Frank Harrison and Elmer O. Torgerson; ATTORNEY, Allen A. Holsclaw; ASSESSOR, Patrick H. Blake; DEPUTY ASSESSOR to check the Nease cruise, J. F. Gorman. M. G. Nease, a resident of Portland, Oregon, to whom was given the contract for cruising timber. John Lewis, in whose name was brought an action on behalf of the timber companies to set aside the Nease contract. Edward Randolph, Roy Wherry, James A. Morrow, John C. Murray, L. E. Albright, Harry M. Leighton, C. M. Conry, A. Hamer, Lester Clark, George Penegor, J. E. Croman, John Miller, C. S. Snyder, Charles E. Hart, Bernard Kelly, L. W. Olinger, W. H. Johnston, F. J. Lods, S. J. Bennison, and W. M. Dockery, were timber cruisers and employes of M. G. Nease on the Clearwater county cruise.

In January, 1914, Patrick H. Blake was probate judge. John T. Molloy was the assessor. Mr. Molloy resigned as assessor and was appointed deputy assessor. Mr. Blake resigned as probate judge and was appointed assessor. He took the initiative and made demands upon the board of county commissioners to have a cruise made. January 11th, 1915, A. E. Hinckley was elected assessor. Oren D. Crockett treasurer, and Fred Choate, John P. Harlan and Jesse L. Coontz were elected county commissioners. Clearwater Timber Company, Milwaukee Land Company and the Potlatch Lumber Company were owners of large bodies of timber in Clearwater county, and conferred with Nease during the time of making the cruise and compared estimates of their holdings with Nease before he submitted his work to the county.

From this point the court might consider our argument beginning at page 78, and, if after considering the first two questions it is deemed essential to make further investigation; or, if the court desires further information concerning the facts it may with profit read the brief of the evidence which follows:

BRIEF OF THE EVIDENCE

THE FIRST CONTRACT.

(Feb. 24, 1914)

Immediately after Mr. Blake had been appointed assessor, he appeared before the board of county commissioners and insisted that the commissioners enter into a contract for the purpose of cruising timber in his county for assessment purposes. The board held a meeting on the 24th day of February, 1914, of which no official notice was given, and entered into negotiations for a contract with M. G. Nease for the cruising of such timber. The county attorney, Allen A. Holsclaw, was called into consultation and he, in writing, advised the board (Tr. 102) to draft plans and specifications "clearly setting forth the kind and character of the work to be performed and making all the necessary stipulations therein tending to inform the bidder as to what you fully expect of him." The county attorney further advised the board to advertise for bids but they did not do so because they did not think it was necessary. (Tr. 364).

Contrary to the express direction of the county attorney, the board advised interested persons that it wanted the timber cruised, and that each person

should prepare his own plans and specifications and the board would thereafter make a selection. Mr. Portfors and Mr. Swanson asked to be furnished plans and specifications, but the board stated that Mr. Nease had furnished his own plans and that if they wanted to do the work they could do likewise. Mr. Nease at that time claimed to have a copyright system on his method (Tr. 313). Such actions of the board tended to stifle competition and were unfair to the taxpayers. Mr. Blake, however, was demanding that the board do something at once and made the threat that if they refused or delayed the matter he would take the matter in hand himself and have the timber cruised. (Tr. 313).

Mr. Portfors wanted to bid on the cruising and talked with Mr. Zelenka about it (Tr. 237), and though demanding plans and specifications, he was told at the meeting by Commissioner Zelenka that his bid would not be considered because he had worked for timber companies (Tr. 238), notwithstanding the fact that he was not then in the employ of any timber company. When Mr. Portfors was trying to find out what was wanted through Commissioner Harrison, Assessor Blake took the floor and demanded that the contract be let then and there. (Tr. 238).

It was conceded that no notice or call for bids was made, notwithstanding the fact that it was the practice of the board to call for bids on all contracts involving over five hundred dollars (Tr. 301). At this meeting, however, two other bids had been filed—one by Ralph B. Hunt (Tr. 47) wherein he agreed to do the cruising for actual cost plus two cents per acre for every acre carrying over one million feet B. M., with a guarantee that the total cost would not exceed eight cents per acre (Tr. 50). E. L. Rankin also filed a bid (Tr. 51), wherein he agreed to cruise and estimate all timber on sections carrying over one million feet B. M., and furnish topographic features, etc., at a total cost of seven and a half cents per acre.

Attention is called to the conditions of each of these bids, that the charge should be made only upon lands cruising over one million feet B. M. It will later be shown that in accordance with the terms of the contract with Mr. Nease he was to be paid twelve and a half cents per acre for cruising patented timber lands. Nevertheless, he was paid for cruising not only patented timber lands, but state and government timbered lands, and also for marshes, burns, agricultural lands and townsites. The board, however, apparently gave no consideration to anything but the bid submitted by Mr. Nease, other than

to say that the others were not satisfactory (Tr. 229) though no reasons were assigned. Objection seemed to be made to all persons seeking the work other than Nease, on the ground that they had at some time worked for a timber company (Tr. 230). However, Nease was not a practical timber cruiser and did not pretend to be (Tr. 350)—he was nothing more than an employer of timber cruisers and engaged in selling their work to various counties at great profit to himself.

Notwithstanding the fact that the assessor and county commissioners insisted that a contract be entered into on the 24th day of February, and notwithstanding the fact that the board did not have time to find out what kind of a cruise they needed themselves, and had made no plans or specifications with reference to the manner or method of making the cruise of the kind or features of topographic reports that were required, and notwithstanding the fact that the spring is the best time to cruise, for the reason that the snow is on the ground and is well settled and the brush, which is very difficult to go through in the summer, is eliminated by cruising on the snow (Tr. 235), nothing was done by Mr. Nease toward getting into the timber until about the 6th of April when he arrived at Bovil (Tr. 665), and

wired the Potlatch Lumber Company, asking it to arrange for accommodations for his party and the county officials.

These same county officials who were afraid to even employ a cruiser who had worked for a timber company, were included in the request made by Mr. Nease to the Potlatch Lumber Company for accommodations. Nease apparently expected some opposition from the timber companies at some time, and commenced to make peace with them early.

THE SECOND CONTRACT.

(April 15, 1914)

On or about the 8th of April, 1914, and immediately after Nease had commenced the cruise, a complaint was filed by the Clearwater Timber Company in the name of John Lewis (Tr. 648) against all of the county commissioners, the county treasurer and M. G. Nease wherein the plaintiff prayed to have the contract with Nease cancelled; and that the county be enjoined from issuing any warrants for work done under such contract (Tr. 661). This complaint advised the defendants that Nease and his cruisers were non-residents; that they were not deputy assessors; that they were not proceeding according to law; that the contract price would exceed the income

and revenue for that fiscal year, in violation of the constitution of the state of Idaho; and that the ordinary and necessary expenses of Clearwater county would exceed the income and revenue provided for said county for said fiscal year (Tr. 658). The board was further advised that neither the board of county commissioners nor the county assessor would have any control over timber cruisers. (Tr. 657).

All of the commissioners were served with copies of this complaint on the 13th day of April, 1914, (Tr. 352) and on the same day each of the defendants in the case, including M. G. Nease, had been served, not only with a copy of the complaint, but with a copy of the summons and order to show cause, together with a copy of the affidavits annexed to such order (Tr. 64). By the service of these affidavits upon each of the county commissioners and upon all of the defendants, they were advised: That the same M. G. Nease had in 1913 taken a contract to cruise heavily timbered land in Clatsop county, Oregon, at $12\frac{1}{2}c$ per acre (Tr. 71), and that he had sublet the work to Mr. McKinnon and others at $4c$ per acre—the cruiser was to pay his compassman and provide all subsistence; that Nease had required James P. Hagadone to violate his written instructions with reference to the method of cruising, and to comply with verbal in-

structions (Tr. 78) ; that it was impossible to make a thorough cruise by a single run through the timber (Tr. 79) ; that the cruising of timber was not only inaccurate and unreliable, but that Nease was unreliable in his transactions ; that a cruise such as Nease intended to give was of no value for assessment purposes on account of the wide variation in the judgment of cruisers (See affidavit of H. M. Price (Tr. 80) wherein on the South half of Section 14, Township 6, Range 3 east, Price found 21,160,000 feet, whereas Nease found 50,850,000 feet). Tr. 80-3 ; that the Nease cruisers were "careless, incompetent and crooked," and that the Nease cruise was not even a good guess (Tr. 76) ; that the head checker for Mr. Nease, viz. John W. McKay, was incompetent, and by the insistence of A. Osborne, his cruising was so proven in Oregon. (Tr. 74-5).

A reading of this affidavit showing the fight that one individual timber owner had in order to get a correct cruise, would certainly put a county commissioner on his guard before letting the contract to M. G. Nease or to any other person. Here, not only after the recheck of the cruise had been made and before the owner could secure justice, it was necessary to send out five men to count the trees, and it took

these five men four days on one quarter section to prove that Nease's cruise was grossly erroneous.

The evidence further on will show that these cruises are nothing more than the wildest kinds of guesses on individual tracts of land and are of no value for assessment purposes; that in order to make a cruise which would be of any value for any such purpose, the cost thereof would be absolutely prohibitive; that nothing less than an actual tree count could get the board measure of timber on individual tracts, and even then the elements of judgment of the particular cruiser for deductions for breakage and rot and defects, enters so largely into the estimate that under those conditions no two cruisers going over the same land at the same time and under similar conditions would arrive at the same result; and these commissioners were further advised that Nease had been in trouble on account of his cruise also in Clackamas county, and that a petition for the recall of the county judge and one of the county commissioners had been filed on the 22nd day of July, 1913, and that said county judge and county commissioners of Clackamas county had been recalled by an election held on the 16th day of August, 1913, on account of these officers entering into a contract for

the cruising of timber with M. G. Nease in that county. (Tr. 87-9).

The question of the legality of the board entering into such a contract without complying with the law requiring the appointment of deputy assessors, and especially without having funds with which to pay for such work, was brought to their attention, and is admitted by the commissioners. Knowing these facts the commissioners were eager to enter into another contract with Mr. Nease involving over \$63,000.00.

The county commissioners had consulted Attorney Dwight Hodge and Attorney Geo. W. Tannahill, and both of these attorneys had advised them that their contract was not worth very much and that perhaps they had better have a new one (Tr. 306). County Attorney Holsclaw had advised them that it was not worth the paper it was written on (Tr. 305), but notwithstanding the fact that the board knew that the cost of this cruise would exceed the levy, and that it would be necessary for future boards to make levies in such amounts as they could to take care of these warrants (Tr. 301) and that the liability would exceed the income for the fiscal year, and that no election had been called and no arrangements made

to pay for such indebtedness (Tr. 658), and without waiting for a judicial determination of the legality of such contract with Nease, (Tr. 300) the board of county commissioners held a meeting with Nease and their respective attorneys, cancelled the old contract, and entered into a new one.

Nease testified (Tr. 337) that he cruised in Clackamas county approximately 600,000 acres, "3-4 of the amount was farm lands with just a piece of timber here and there and all very accessible," at the contract price of \$51.20 per section. (Tr. 89). It certainly was no wonder that these officers were recalled, but it is rather remarkable to notice that, notwithstanding the knowledge of the foregoing conditions, the Clearwater County commissioners would have any further dealing with Nease at all.

At the meeting of the board held two days after they were served with summons, complaint, order to show cause and affidavits in the John Lewis suit, a meeting was held at which there was present no one to submit bids for the cruising of timber, other than Nease; no plans or specifications for cruising were prepared by the county commissioners, (Tr. 232), and a second contract was entered into on the 15th day of April, 1914, which contract is set out in full

(Tr. 95-101). By the terms of this contract (Tr. 96 Par. 1) Mr. Nease agreed to "make or cause to be made a careful, complete and thorough cruise and estimate of all of *the timber on patented lands* situate in Clearwater county, Idaho."

Under the first contract the board of commissioners on the 28th of March, 1914, designated 36 sections to be cruised (242), whereas the second contract provided for cruising of timber lands in the county, with the permission to withdraw certain lands.

METHODS AND COMRARATIVE VALUE OF CRUISING.

(a) *Single run and similar systems valueless for anything other than a reconnoissance.*

The evidence will show that there are in use by timber cruisers more than forty different methods of cruising (Tr. 379), and that timber cruising is not a science, but at best it is only the result of a man's judgment and experience in looking at a small portion of timber on a strip of ground and using that as a basis upon which to guess at the amount on the balance of the ground (Tr. 379); for instance, if a cruiser worked north and south through a section of land, and another one worked east and west through

the same section, their results on account of having seen different portions would probably vary to a large extent. Not only does the direction taken by the cruiser have a considerable effect upon the amount of timber he will guess is on the given tract of land, but the weather affects his judgment, and a cruiser will get more timber on the same land in bright weather than he does in bad weather. (Tr. 380).

An assessment of property for taxation under the laws of Idaho includes a listing and valuation. If it is necessary under the laws and the constitution of the state of Idaho to list the timber on timber land by the thousand feet, as is purported by the Nease cruise, it would be necessary to make a tree count upon each individual tract; and the cost thereof would be prohibitive. As will be shown, the methods employed by the Nease cruise in Clearwater county were about as effectual in determining the amount of timber on individual tracts as though the assessor had taken a compassman and followed a few direct lines through the county and counted the number of cattle and horses he saw on a certain strip of ground, and then multiplied the number found on that strip by the ratio that the area of the strip bore to the entire county. Such a proceeding of course would

be nothing more or less than a farce, and the evidence in this case conclusively shows that the purported cruise under the Nease contract was not only inaccurate and of no value for assessment purposes, but that fraud and deceit also entered into the work and the reports turned into the county were prepared *outside* of the state of Idaho and in the state of Oregon, and that the topography and various reports were faked and changed in order to suit the dictates and caprice of the contractor.

The evidence will also show that these non-resident timber cruisers were attempting to exercise the functions of the assessor, not only in the purported listing of timber, but in making a decision as to whether or not a body of timber should be assessed or listed on account of its location or supposed merchantability.

Reference is made throughout the transcript to single-running and double-running, and various other methods of cruising. The witness Randolph gives a very good description of the method used (Tr. 252). In general the cruiser in single running follows the compassman on a line through a 40-acre tract and counts the trees on a strip of land four rods wide, and by assuming that the balance of the land con-

tains the same amount of timber as he saw on the narrow strip with (certain exceptions for burns, etc.), he arrives at an estimate of the amount of timber on the particular tract of land.

There are many reasons why such a method is of absolutely no value to a county for assessment purposes. First, the results are inaccurate and the variation of individual cruisers, as will be shown, may amount from 100 per cent to 300 per cent in going over the same land at the same time and in the same direction. If the land were all level and the timber uniform, of course such a method might be fairly accurate, but with deep canyons and high ridges, and the ground covered with underbrush (Tr. 316), cruising in Clearwater county is very difficult. It is still more difficult for the reason that the timber is not uniform and the cruiser will have to take into consideration red fir, white fir, pine and other kinds of timber, including old growth and new growth all at the same time. (Tr. 235).

Bearing in mind that the contract Mr. Nease entered into with the county was that he was to furnish a complete and accurate cruise of all of the timber on the patented land in Clearwater county, we call the court's attention to the following testi-

mony which has a bearing upon the method employed by Nease:

A thorough cruise by single running is impossible. (Tr. 79).

Cruising is nothing more at best than an estimate based largely upon the judgment of the estimator, which he gains by experience in the field. (Tr. 294).

A single-run cruise is of no value for commercial or assessment purposes on 40-acre tracts, although it might be a fairly good average on a large tract. (Tr. 292).

All cruising is but an estimate, and two experienced estimators may vary materially in their estimates." (Tr. 293).

"If a man makes a double-run cruise he will not get as accurate an estimate as if he made four runs. The more runs the cruiser makes and the larger the area of the tract upon which he counts the trees, the more accurate his estimate will be * * * *"
(Tr. 294).

Mr. Benjamin E. Bush, who is a high grade cruiser and has been field agent for the Idaho State Land Department said: "I doubt if a cruiser could

average a quarter of a section a day if he followed the written instructions given by Mr. Nease to his cruisers * * * " (Tr. 292). These instructions are found at Tr. 110-15.

One cruiser might go one way through a forty and see only white pine and he would report all white pine, on the forty, whereas the other cruiser might go a different way on the same forty and see practically all some other kind of timber, and his report would be at absolute variance with the other cruiser (See testimony of J. C. Murray, Tr. 373-74). (Mr. Murray was a supposedly high grade cruiser employed by Mr. Nease to check the work of the other cruisers in the spring).

It is impossible to make a thorough cruise by a single run. (Tr. 73).

One of these cruisers admitted that he cruised (?) 960 acres in one day (Tr. 440), and explained that he did it by looking over the ground from the top of a hill. Plaintiff's witness, Gorman, testified that a thorough, complete and accurate estimate of timber can not be secured by going through it once. (Tr. 449).

Cruising is a guess (Tr. 270) and a single run is not accurate. (Tr. 271).

“One can not arrive accurately at the amount of timber in individual 40-acre tracts by a single run method of cruising.” (Tr. 275).

Plaintiff's witness Miller testified that he would not work for Mr. Nease in the cruising of this timber if he had to stand for a check on individual forties.

A single run is generally used in preliminary work. One can't get all the timber in that way in a rough country. (Tr. 249). Nease instructed his cruisers that single-running would be satisfactory (Tr. 253), and the amount of acreage covered by the man, as is shown by the reports, shows that that is the method they employed during the fall cruise.

An average day's work for a timber cruiser is about 160 acres of standing timber (Tr. 251), and it may run to as much as six forties.

Mr. Nease testified (Tr. 347) that “John W. McKay in timber circles in the Northwest is rated as a “top-notch.” “His ability and integrity are absolutely unquestioned.” He was supposedly one of the best timber cruisers working under Nease, and was employed during the spring to check the cruisers. . However, he did cruising in the fall. This is the same man who, according to the affidavit of Mr. Os-

borne, (Tr. 75) said that he had twice cruised one quarter section of land and found 8,533,000 feet of three kinds of timber thereon, whereas in truth and in fact after a tree count and a cruise by five men, there was in reality only about 3,843,000 feet (Tr. 74 and 75).

Not only is the report on the timber governed by the individual cruiser, but it is customary to sometimes raise and lower a cruiser's work arbitrarily; and Mr. Nease informed his clerk to raise the report of all of the work of Mr. Bennison about 30 per cent. (Tr. 377-8).

(b). *More effective methods of cruising.*

Theodore Fohl testified (Tr. 316) that his method of cruising was to run through each forty four times.

Mr. Gorman, the checker for the county, stated that he could properly estimate from 160 to 320 acres per day but that he had no way of knowing what Nease's men were doing. As will be later shown, the Nease men got a far greater acreage than was consistent with any reasonable method of cruising.

We find one of the plaintiff's witnesses, Harry

Layton, testified that a checker checked a checker and they could not agree. Mr. McKay, one of Nease's checkers, checked the work of Mr. Murray, one of his checkers, "and they did not agree as to size, number of logs to the tree, or in any way in regard to an estimate. They seemed to be working on entirely different systems." (Tr. 391).

If the confessedly two best men that Nease had with him could not agree, either as to sizes or number of logs per tree, or on any other particular, then what could one expect of the rest of the work? If these two men who were supposed to check the work of other less competent men could not agree upon any of the particulars with reference to a cruise, then certainly such a cruise would be of no value as a listing of property for assessment purposes.

The plaintiff's witness, J. D. Gorman, testified (Tr. 449) that when he was working for J. D. Lacey & Company, he was required to go through a forty, eight, twelve and sixteen times; that he had just come from a cruise where they were required to go through each forty eight times. This, however, cost 40c per acre.

Mr. Charles Portfors testified that his method of cruising was to go through each forty twice (Tr. 233)

and that 160 acres was a good average for a day's work (Tr. 235) ; that the best time to cruise timber was in the spring while the snow was settled (Id.), that a single run is of no value for assessment purposes (Tr. 236) ; and his method of computation is set forth Tr. 236-7.

Ellis Small testified that in the preliminary cruise they went through each forty twice, and in the final cruise they passed through each forty-acre tract eight times, and by that method he would cruise about 40 acres a day (Tr. 314-5) ; that in order to follow Nease's instructions, one would have to go through the land twice to get the information called for. (Tr. 317).

Plaintiff's witness and checker, J. C. Murray, testified that he thought his instructions were to double run unless in his judgment under certain conditions a single run would be sufficient. (Tr. 322). He cruised about 25,000 acres in 86 days, or an average of 310 acres per day, (Tr. 322) but most of his work was on smooth ground. (d).

The amount of acreage covered by each of the cruisers according to the field reports, is found in the transcript, pp. 290-91.

(c). THE SPRING AND FALL CRUISES.

The record shows that Nease commenced to cruise about April 8th and continued until the 16th day of June (Tr. 333). This was referred to during the trial as the "spring" cruise, and it appeared that during these few days the men were endeavoring to get pretty accurate results, because they double run all of the work (Tr. 248). During this spring cruise Mr. Nease also had checkers after his men in the field. All cruising was abandoned, however, on the 16th of June and was not again taken up until about August 1st. (Tr. 333).

The testimony would point to the conclusion that the pending of the John Lewis suit caused Nease to withdraw his men until he could make peace with the timber companies, which was done during the summer and before his men started to work again in the fall, as the evidence hereinafter referred to will conclusively show. Nease denied, however, that the Lewis suit had any effect upon his withdrawing the men and stated that the death of an uncle had something to do with financing the job (Tr. 334). The letter, however, offered in evidence by plaintiff, bearing date February 19, 1914, and signed by Mr. R. L. Howard, assistant cashier of the Ladd & Til-

ton bank, of Portland, Oregon, wherein it is stated: "We have from time to time assisted Mr. Nease in the financing of his operations, and the writer does not know of an instance in which a request of Mr. Nease has been refused." (Tr. 576), would indicate that something other than the death of an uncle who might have assisted financially, was the moving cause for the withdrawal of these men from the field.

However that may be, the timber companies and Nease reached an amicable settlement and the John Lewis suit, which was instituted by the timber companies, was settled and by them later withdrawn pursuant to an agreement had with Nease, and Nease brought his men back into Clearwater county about August 1st and turned them loose into the timber, with tacit if not express instructions, in all instances, to go over the ground as quickly as possible and turn in the reports. During this fall cruise the larger portion of the ground was covered. It was all single run, and Nease employed no checkers in the field. The sole object was to cover the ground, make a report, get the money and get out of the country.

The witness Wherry testified (Tr. 258): "I double run the larger portion of the land I cruised for Mr. Nease in the spring * * *. All the land I cruised in the fall was single run."

They were double running most of the land in the spring (Tr. 240), but in the fall they were instructed to single run it.

TIMBER CRUISING OF NO VALUE FOR ASSESSMENT PURPOSES.

Notwithstanding, the apparent mandatory requirements of the revenue laws of the state of Idaho upon the assessing officers, which had been in force in the state of Idaho for many years, and notwithstanding the argument of the appellant to the effect that an assessing officer must cruise timber in order to arrive at the value of timber lands, nevertheless, there has been no case where the assessing officers have been required by mandamus proceedings or otherwise to cruise or even estimate growing merchantable timber. Notwithstanding the continued agitation among certain inhabitants of the state during political campaigns, and at other times, and through the press, no one has conceived of the idea that under our laws existing at the time of the letting of the Nease contract and prior thereto, and since that time, it was necessary to have such a cruise made.

In Idaho, a number of people at various times appear to live in constant fear that timber compan-

ies are going to seek some advantage over other property owners, and the companies are assailed from some sources and defended from others. It would seem that Clearwater county was no exception to this rule, and when P. H. Blake resigned from the office of probate judge (which office carried a very small amount of labor) and assumed the office of county assessor, that the agitation had reached such a point that something was going to be done in Clearwater county. It looked upon the face of it as if the timber companies were going to be the butt of the Nease cruise, that they would bear the expense of the cruise, and that the extent of their holdings would be made a matter of public record.

The evidence will show, however, that long before the fall cruise was commenced, Nease was working hand in hand with the timber companies. They knew every move he made and he was in conference with them time after time—in fact it will be shown that all of his work was exhibited to and compared with the cruises of these timber companies in Clearwater county before it was submitted to Clearwater county; that the estimate of Nease was so far below the actual estimate which the timber companies had, that no complaint was made by them upon any cruise turned into the county by Nease. This is

a rather curious coincidence, when we take into consideration the errors which occurred in cruising, as have been and will be hereinafter shown.

THE LISTING—VARIATIONS IN JUDGMENT OF CRUISERS.

It must be conceded that if property for assessment purposes is going to be listed, there must be some system of listing which will be practically uniform. The Idaho laws and constitution specifically provide that property shall be assessed by a uniform method. If for the sake of argument we should say that a timber cruise was necessary, it goes without saying that the cruise must list the amount of timber as nearly as practicable on each individual tract.

The evidence will show that notwithstanding the fact that a cruiser might in cruising say ten thousand acres of land, arrive at a fair estimate as to the amount of timber on the total, his judgment would vary so much upon individual legal subdivisions as to make it absolutely worthless for assessment purposes when that ten thousand acres would be owned by fifty or seventy-five individuals.

The checker, Murray testified (Tr. 385) "If a question arose in court as between the county and a taxpayer who owned only 40 acres of timber land or

160 acres of timber land, two competent cruisers might, after investigating it, come in and one honestly testify to a million and the other to two million feet on the particular tract."

Mr. Murray also testified "I have known what we consider the best cruises to vary 300 or 400 per cent, but I should think that a usual, ordinary, natural variation ought not to exceed 25 per cent."

He further testified (Tr. 380) "The same cruiser never gets the same result in cruising a tract of land a second time after a lapse of a few months or a year. He will vary over ten to twenty-five per cent. This is because he does not see it at the two different times in the same way."

Murray also testified (Tr. 323) "the estimates of ordinary competent cruisers of the amount of timber on individual 40-acre tracts will vary very much, *frequently as much as fifty per cent or more.*"

Of what value then is such work to an assessor in the listing of property, if an ordinary, competent cruiser can not get any closer to the amount of timber on an individual 40-acre tract? The work would have no authenticity, would not back up the county commissioners or the assessor in case of dispute, and would therefore be absolutely valueless.

Murray also testified (Tr. 384) "Two competent, experienced cruisers, cruising side by side at the same time and in the same manner, might reach substantially different conclusions on individual 40-acre tracts. As a whole they would not. One might find 1,500,000 on a forty and another 1,000,000; there might be a difference of 33 1/3 per cent or 50 per cent.

Plaintiff's witness Miller testified (Tr. 456) "I would not stand for a check on individual forties * * the amount that I might differ in my estimates on an individual forty from the checker's estimate would depend on where I would start and where the checker would start and how much green timber and burned timber there would be on the forty. I have varied 100 per cent from other men, and I have been as close as two and three and five per cent of what fair-minded men would put on a forty."

Plaintiff's witness C. M. Conry testified (Tr. 427) that there might be between 25 per cent and 40 per cent variation on particular tracts, and assigned different reasons for these variations.

The plaintiff's witness Hamer testified (Tr. 434) "In my judgment 25 or 35 per cent would be a normal percentage of variation between the esti-

mates of two competent cruisers on the same 40 acre tract. A difference of from 30 to 45 per cent would be considered a good cruise. Variations in excess of that sometimes occur."

A FEW SPECIFIC INSTANCES OF VARIATION

Clearwater county could not go to the expense of an entire recruse in order to show that the work was valueless to an assessor, but it did employ a compassman and two cruisers to go out and check some of the work turned in by Mr. Nease. These recruses show that the Nease work was hastily done; that it was unreliable and incompetent for any purpose. If a cruise were required one might overlook the honest variation in judgment between timber cruisers on certain points, but we can not overlook the report to the county of land as "burned" where in truth and in fact it was covered with a good growth of green white pine.

The difference in the judgment as to the amount of defects makes a wide variation (Tr. 383), and, in order that the work of the cruiser may be a fair check, it is necessary that the checker go over the land at the same point and in the same way as the cruiser (Tr. 379); if the cruiser ran east and west and the checker north and south of course there

would be no check at all. The owner of the land, however, and the assessor, relying upon one of these reports would have to take one or the other. Many of these timber owners reside outside of the state of Idaho and would without question have to accept the amount for assessment purposes placed upon the roll by the assessor from one of these cruises. If the cruiser walked east and saw only buck brush and black pine, his estimate would probably contain a few poles or possibly nothing. If the cruiser walked north through a heavy strip of white pine, the owner might be assessed upon a basis of having four million feet of white pine. Can such work be considered of any value for assessing purposes?

If the checker reports that a cruiser is low or high, the estimates of such cruiser may be automatically raised in the office. (Tr. 350).

The county commissioners knew of these wide variations in timber cruises, and had them specifically called to their attention in the affidavits filed in the John Lewis suit. (Tr. 74).

Nease testified (Tr. 348) that some cruisers hit and miss, and that nothing can be done with them; that others may be uniformly low or high; and that a checker, after determining his percentage of error, adds to or subtracts from the report sent in by the

cruiser, and makes, according to the office, a nice, uniform cruise. And the witness Nease, knowingly referring to the large discrepancy shown by the field reports of Murray on the Northwest quarter of the Northwest quarter of Section 18-39-6 E. showed that the crossed-out figures were not turned into the county, "but other figures that were written in are the ones that were turned into the county. Mr. McKay did not file any estimate of the result of his cruising. I think Mr. Fulton wrote the substituted figures in."

Changes were made in the office on the reports sent in by Cruiser Morrow on sixteen different forties (Tr. 349). It was not shown that Mr. Morrow was ever called into consultation with the checker or asked any questions concerning his work, but an arbitrary change was made.

We call the court's attention to the field reports of two of Nease's cruisers, Murray and Hart, (Tr. 373) where they accidentally cruised and turned in reports on the same land. On the southwest quarter of the southwest quarter Murray found 400,000 feet of red fir and 200,000 feet of white fir. Hart found only 100,000 feet of red fir and 10,000 feet of white fir, and 15,000 of white pine. Murray found three

times more red fir, twenty times more white fir than Hart on one 40-acre tract, while Hart found 15,000 feet of white pine which was entirely overlooked by Murray. In the southeast quarter of the southwest quarter Murray found 300,000 feet of red fir, and 150,000 feet of white fir; while Hart found 150,000 red fir, no white fir, and 15,000 white pine. On the entire 160 Murray found no ties, while Hart found 37 ties. On the southeast quarter of the southeast quarter Murray found 300,000 feet of white and red fir, while Hart only found 40,000. Murray found nearly eight times more than did Hart on one 40-acre tract.

Now these reports are from two of the best cruisers that Nease had in the woods. This is the only place that we were able to find field reports where two of Nease's men unknowingly covered the same ground and filed field reports of their work, and it certainly is an object lesson as to the method employed in the Nease cruise. Plaintiff's witness Murray was on the stand, and the only explanation he could give was "Mr. Hart might have gone over the forty in a different manner than I did, and that might account for the difference." (Tr. 373).

If these exceptionally good cruisers varied from 500 to 800 per cent on the amount found on an individual forty-acre tract, there is certainly a great

gamble and lottery in the amount of error in the reports that would be turned in on over 500,000 acres of timber land in Clearwater county.

In one of the field reports where Nease returned to the county no white pine at all, there was indicated by somebody "somewhere in Oregon" that on that particular 40-acre tract there were 225,000 feet of white pine (Tr. 328). We also call attention to the field report of Section 28, Tp. 39-3 E, where the figures in the margin indicate the estimate of timber companies for comparison with the Nease cruise on white pine (Tr. 335); and on this one little tract it is shown that where Nease reported 450,000 feet of white pine, the company had an estimate of 600,000 feet; where Nease had 450,000 feet, the same company had 1,100,000 feet; where Nease had 650,000 feet, the same company had 1,000,000 feet; where Nease had 550,000 feet, the same company had 1,100,000; where Nease had 700,000 feet, the same company had 750,000; where Nease had 600,000 feet, the same company had 900,000.

There is a statement of the ownership of timber lands in the records (Tr. 675 to 750 inc.) which shows that the Clearwater Timber Company, the Milwaukee Land Company and the Potlatch Lumber

Company owned practically all of the land estimates on which had been compared in Nease's office in Portland, Oregon, before such reports were delivered to Clearwater county.

Nease further testified (Tr. 336) "None of the timber companies complained because I had 450,000 white pine where they had 900,000."

If counting the trees and estimating the timber on a strip of land two rods wide is to be taken as the basis for determining the amount of timber on the entire forty, then with the same reasoning can we come to the conclusion that the same proportion and magnitude of error and discrepancy in the Nease cruise disclosed by the comparatively small amount of rechecking performed by Wherry, Swanson and Albright, would be shown in all of the work performed by Nease.

The testimony at the trial covering the period of six days, showed hundreds of such inaccuracies as have just been pointed out, and in all the time the plaintiff and Nease and his cruisers were on the *defensive* trying to explain variations, discrepancies, fraudulent reports, deceitful work and faked reports, and never offered to show that the work on any

individual tract was a thorough complete and accurate cruise.

These wide discrepancies, whether the result of the difference in judgment in men, or in the method of cruising, or in the weather, or from any other reason, are brought to the court's attention to show that for assessment purposes such work as was done by Nease was valueless, and also that such a method would work an unjust discrimination among the taxpayers not only of the county but of the state of Idaho, as well.

UNFAIRNESS ARISING FROM DIFFERENT METHODS OF ASSESSMENT.

We find that Assessor Blake testified (Tr. 423), "The board, after full consideration, decided that if they had only a portion of the timber lands cruised * * * the other timber owners would probably object, as they would be either getting the best or worst of it and have reasonable grounds for commencing an action against the county for unjust discrimination."

If to assess a portion of the county upon a cruise, and the balance by another method, would constitute an actionable, unjust discrimination, with stronger reason would the cruising of timber in one or two counties of the state for assessment purposes consti-

tute an actionable, unjust discrimination, either in favor of or against those counties for state taxation purposes, and the county cruised would be at a disadvantage before the state board of equalization.

Commissioner Harrison testified (Tr. 310).

“It developed at the meeting of the state board of equalization that we were assessing timber lands in Clearwater County on a different basis than they assessed them in different parts of the state. Some of the counties—I think Latah—I am sure this had a cruise at the time; I think Bonner had some of their land cruised, while in some parts of the state they were assessing by the acre, and in some places by the thousand feet.”

The witness Harrison also testified (310) “Mr. Ramsted of the State Tax Commission, stated that he hoped the whole state was cruised and classified in all timber counties along the lines we had followed.”

While it seems that some of the county assessors and Mr. Ramsted hoped or wished that all of the timber lands in the state had been cruised, nevertheless, there is no intimation or suggestion that the law required a cruise of timber lands for assessment purposes.

THE NON-RESIDENT CRUISERS USURP THE FUNCTIONS OF THE ASSESSOR.

No cruiser was or purported to be a deputy assessor. However, Nease's cruisers did more than act as listing officers; they assumed the functions of the assessor in determining whether or not certain bodies of timber should be reported at all; for instance, plaintiff's witness Hamer (Tr. 436-7) testified that if in cruising he would come upon, for example, 200,000 feet of tamarack in the center of a section, so that the timber was isolated, he might eliminate it entirely, and stated, "If in my judgment it was not of any marketable value as timber, I might not mention it at all * * * * . When I found some sound timber on the land, because of its location or isolation or for other reasons, I did not think was commercially of any value, I considered it to a certain extent. I would probably say there was some, but not to any extent."

This shows that the cruiser attempted to go far beyond the functions of a mere listing officer, and passed judgment upon whether or not they would report certain bodies of timber. It would seem that if under the Nease contract he was to cruise all of the timber on timbered lands, that it would at least be incumbent upon him to report it and let the assessor

determine whether or not it was merchantable or whether it should be included in making the assessment.

The plaintiff's witness John Miller (Tr. 454) testified "In making up my estimate I also took into consideration the value and the location; that is to say, if I found some green timber which I concluded was of no value because of its location, isolation, or some other reason, I would report that there was timber on the ground but not sufficient to turn in as an estimate because it was worthless. *I would not cruise it.* It would have been possible for me to make a report that would have shown the actual quantity of the timber and the conditions and quality in such a way that the assessor could have judged of its value for taxation purposes. I did not do that because I was supposed to use my own judgment in regard to it."

THE REPORTS SUBMITTED TO CLEARWATER COUNTY.

As stated before, the reports submitted to the county are inaccurate and unreliable, and in many instances faked. Paragraph 2 of the Nease contract (Tr. 96) provided: "Said reports to contain topographic sketches showing the elevation of lands

above sea level, taken by means of Aneroid Barometers, said reports to show all openings, burns, marshes, rivers, lakes, creeks, trails, roads, waterfalls, valuable stone, mineral outcroppings, and all other topographic features observed by the cruisers, said reports and sketches to show a general description of the character of the land cruised, describing its adaptability for agriculture, grazing and other purposes after the timber is removed * * * * .”

Plaintiff's witness, Dockery, testified (Tr. 469), “I used my own judgment in regard to the classification of the soil. You can call it that. I walked over it and made a guess at it. I certainly did not dig down into it.”

Cruiser Wherry testified (Tr. 260) that in his report to Nease he showed a broken divide, whereas Nease reported a main divide running through the south half of Section 6, Township 38-6; that there were several ridges shown on his report that were not shown on the report to the county; that there was considerable difference between the reports in the number of elevations shown; that his report showed an elevation on each ridge and Nease's report showed no elevation except on the 40 line; that Nease had reported to the county that this land was steep,

rough and rocky, whereas the cruiser found no such condition.

Plaintiff's witness Croman testified (Tr. 450) that he did not know that the elevations shown on the map were of any value "further than to give a very perfunctory idea of the land. Information of the elevations at the tops of the ridges and at the streams would be more important to a logger than at the section corners. A logger always goes over the land himself before he logs it. I never tried to log by any topography map."

Nease led the county to believe that he was at least double running all of the timber land. Appellant suggests in its brief (p. 24) that if there were some inaccuracies in the performance of the contract, the acceptance of the work by the commissioners was binding upon the county "in the absence of a showing that the commissioners had been induced to make such acceptance by some fraud or deceit practiced upon them in the matter of the acceptance."

The entire work of Nease and his cruisers in Clearwater county was apparently one continual round of fraud and deceit.

Appellant was objecting to the introduction of

the field report of Archie Young, which bore the following notation:

“These two forties were actually cruised. Balance done in camp.” (Appellant’s Brief p. 25).

This notation is quite pertinent, especially when taken in conjunction with the testimony of Fred Bailey (Tr. 227) that Archie Young cruised two sections or 1280 acres by just walking up the trail and back over the same trail.

If the contractor Nease was advised that a cruiser was doing the work in camp, he certainly should have taken some steps to advise the county. In the instructions to cruisers. (Tr. 112) it is stated:

“Take elevations by means of Aneroid Barometer on all lands examined, as follows: You will take the elevations at each section corner, then in going through each subdivision, you will take the elevation on each forty line, whether there is a change in elevation or not, and then you will take further elevations at the top of all ridges and at the banks of all creeks and streams and at the bottom of all ravines. Further than this other elevations should be taken at intervals not to exceed 100 feet in elevation. SHOW EXACT LOCATION AT WHICH ELEVATION IS TAKEN BY MARKING YOUR PLAT WITH A SMALL CIRCLE, AS INDICATED ON THE ATTACHED PLAT.”

With these positive instructions to cruisers and

with the plats being turned into the county by Nease showing two elevations on each forty line, the county would be justified in believing that elevations were shown at the exact location at which they were taken. In the first place there seemed to be lack of confidence in the accuracy of the Aneroid Barometer. We find plaintiff's witness, Penegor, testified (Tr. 447). "I have seen my aneroid barometer change 750 feet in twenty-six hours lying on a table, not moving at all."

The witness Randolph testified (Tr. 251), "At the start I just put the elevations on the forty line of some of my plats. I generally showed four elevations on a forty-acre tract. I did not always read the barometer at the point indicated on the plat. My instructions were to put the elevations at two points on each forty line. Aneroid barometer determinations were very seldom put down on the actual spot where it was taken because we generally put down the elevations at some point designated by even hundreds of feet, and it is often 75 or 50 feet or half a tally from where one is standing reading a barometer to such point."

The witness Dockery testified (Tr. 469) that even though his plat showed two elevations on the

40 line, it did not necessarily follow that his compassman went through a forty twice; that he was probably a tally away. "I can see no reason why the elevations were not taken and reported on along creeks and ravines. By the looks of this here, it does not seem that my compassman showed on my reports the changes in elevations exceeding 100 feet regardless of the forty lines. I figured that the elevation was a minor proposition any way. When I cruised the forty line only once, I showed the elevation twice to give more data."

The compassman for Archie Young (Tr. 277) visited only one section corner for cruising of sections 24 and 25, and yet the plat turned in to the county showed elevations taken twice on each forty line in each section. By taking two actual readings, Nease's men indicated on the plat to the county that 160 actual readings had been taken on these two sections.

The cruiser, Conry, testified (Tr. 430) that he showed two elevations on each forty line because the instructions called for them, and he also testified that his compassmen did not take elevations at all on tops of ridges and beds of streams and that "It was impossible to comply with instructions in that

regard. I complied with instructions as much as I considered necessary to get results."

The cruiser Hamer testified (Tr. 438) "My compassman did not take the elevation. I did it. I did not personally go to all points where the elevations are indicated. The elevations on the plats do not indicate points at which I actually read the barometer. They indicate the elevation as near as I could judge from any point taken by me."

The witness Penegor testified (Tr. 446), "I do not know any particular reason why we indicated two elevations on the forty line when we were single running."

The witness Wherry testified (Tr. 258), "My instructions were to put two elevations in, one on each side of where I actually was, in order to indicate a double run."

The compassman Layton testified (Tr. 389), "In doing topographic work I did not put in the elevations on the forty lines as specified in Mr. Nease's written instructions to cruisers, because Mr. McKay told me to put four or more elevations on the forty, at points so that the four elevations would be an equal distance from the center and sides of the forty."

ALTERATIONS AND CHANGES MADE IN THE OFFICE.

We find that not only was the work of the timber cruisers inaccurate and deceitful, but flagrant changes without consulting the cruiser were made in the office. The witness Murray heard Nease tell Fulton (Mr. Fulton was chief clerk for Nease) to raise a cruiser's estimate a certain per cent (Tr. 323).

The cruiser, Wherry, reported 27,000 ties on section fifteen, and these were all omitted from the reports to the county. (Tr. 259).

Compassman Layton testified that he used no ink in the making of his field reports, and that "the figures 1215 under white pine (this would indicate 1,215,000 feet of white pine), the figures 140 in white fir, and the figure 100 in red fir, and the figure zero in the spruce column, all opposite the northwest quarter, I don't think were on the report when I turned it in." (Tr. 389).

He further testified (Tr. 390) that the figures would indicate that the report had been revised by a checker and that the changes were not made prior to the time the reports were turned over to Mr. Nease.

It seems rather curious that the checker would find no white pine at all on a quarter section of land without a recruise or without saying anything to the cruiser or compassman about a large body of timber as reported.

A tract of land which was owned by the state was designated on the field report turned into Nease, plainly, "State Land." (Tr. 257). This land was reported into the county and included in that for which Mr. Nease was paid.

Mr. Becker testified (Tr. 474) that when he examined the report in Portland it bore a notation in lead pencil to the effect that it was "state land" and that the notation at the time of the trial had been erased and was not noticeable except by the aid of a glass.

Mr. Nease testified (Tr. 326), with reference to the erasure of this notation that only he and Mr. Fulton had access to the reports since they were examined by appellee's attorneys in Portland. The facts disclose, however, that they were even doctoring up these field reports and making changes and erasures long after the suit had been started and long after they had been examined by the attorneys

for the appellees and before they were exhibited in court at the trial.

The witness, Albright, worked for Mr. Nease in Portland in the office assisting in making up reports, copy work, putting in some elevations on some of the drafting, and *jibing* the sections and townships. Witness stated, "By jibing the sections, I mean connecting up all creeks, outlines, burns, etc., where they cross a section and township line. In doing this I had to make changes in the creeks, outlines and burns and also elevations in order to reconcile the reports, and I made such corrections on the original field reports." These reports were all made in lead pencil, and the cruisers were instructed to make them in lead pencil. Changes, alterations and corrections in the office made by an expert draftsman might be very hard to detect a year or so after the work had been done. These original field reports were written in the office of Mr. Nease in Portland, Oregon, and the results of the work as finally "jibed" and smoothed out were delivered to the county long after the men had quit work and been discharged. In this class of work quite generally the field report would come in with nothing said about logging conditions or any of the "write-up," and instead of referring the field report back to the cruiser for atten-

tion, the boys in the office just wrote it up to suit their own ideas. They made it look very pretty on paper, but founded it on nothing more substantial than the imagination of the office clerk who happened to be making the particular write-up. They even furnished an imaginative description of the timber from the size and amounts given. (Tr. 367).

Take the field report of the cruiser Penegor; where he found 16,000 feet of white pine, it was scratched off and not reported in the estimate to the county. (Tr. 445).

Changes were made in the elevations of Penegor's reports (Tr. 447), and the percentage of clear timber on section 36-41-1E was raised from ten to sixty, and the witness knew of no reason why the change should have been made.

The witness, Morrow, testified (Tr. 284), "I heard Mr. Nease make the remark to Mr. McKay that he did not see any timber on the south half of section 21-39 range 6E. Then Mr. McKay took a sheet and went out into the other room and when he came back he said 'there is something on there now.'"

The cruiser, Croman, testified (Tr. 451) that certain figures and interlineations on his report were written by someone else and that portions of the

write-up which were stricken out in pen were not done by him, and that a further notation "damaged by fire," was not put on the report by the cruiser. This seems to be taking considerable liberty with the work of the cruiser; nevertheless it was part of the Nease system.

Where Morrow had found 690,000 feet of fir, his report had been changed in ink to 75,000, and where he found 410,000 feet of cedar, the figures had been changed in ink to 125,000 (Tr. 410). A large number of other changes in the reports of the witness are shown on page 411 of the transcript.

Appellant even assigns as error the admission in evidence of plats showing that Nease had fraudulently changed the work and reported to the county different figures than were given to him by his cruisers, and the flagrant differences are set forth in the specifications of error (Tr. 778 and in appellant's brief p. 37). This exhibit plainly shows that Nease deliberately failed to report to the county the timber that was found by the cruiser.

WORK IN THE FIELD.

The witness Albright testified (365) that they changed from double running the land to a single run "upon the orders given me personally at Elk

River by Mr. Nease * * *. He asked me if we were double running and I told him that we were, and he told me to tell Mr. Weir to single run the balance of the time. I so told Mr. Weir."

It took them a week to cruise 1000 acres by the double run method, and by single running they cruised 7600 acres in 23 days (Tr. 366).

Nease demanded a written statement to the effect that the work had been done by the cruiser in accordance with the written instructions, when in truth and in fact he had verbally instructed them to do the work otherwise. (Tr. 369).

Nease gave the cruisers the impression that acreage was the main thing wanted, regardless of the quality of the work. (Tr. 268).

The written instructions to cruisers required them to make an N at each section corner and quarter corner, but Nease positively instructed Wherry to cease marking corners with his own name (This would permit a checker to know whether a cruiser had been at the particular corner) or else to vary his mark (Tr. 257). Nease instructed his men in the field to get acreage and get through as quickly as possible (Tr. 259). The witness also testified that

he failed to find the letter N marked up by Nease's cruisers. (Tr. 266).

The field books containing the original work done by the cruisers were written by them, and these were not even turned in to Nease (Tr. 246). The county, therefore, was furnished no original work;—just reports after they had been changed and jibed in the office at Portland.

Cruiser Randolph averaged 190 acres per day during the spring cruise, and in the fall when he was single running, he averaged 450 acres per day. (Tr. 247-8). He also testified (Tr. 48), "*I cruised some farm lands taking the topography of it, and I cruised the town of Weippe.*"

In the checking work by Wherry and Swanson, it was discovered that where Nease had reported certain land to the county as "burned over" land, Swanson found a large quantity of green growing timber. (Tr. 369).

GOVERNMENT AND STATE LAND.

The contract with Nease provided that he was to be paid for cruising all the timber on patented lands situate in Clearwater county, Idaho. (Tr. 96).

The total amount of land cruised and for which

warrants were issued, amounted to 503,997.52 acres. Of this amount 144,675.49 acres included state and government unpatented land and land platted as "untimbered" (Tr. 644-46). After the answer of the appellees had been filed, appellant commenced to see the enormous amount of acreage included in the government and state lands, for which Nease had returned reports to the county and received warrants. Explanation of the point theretofore undiscovered was difficult. However, it made an attempt, and we find that Commissioner Zelenka testified (Tr. 355) that Nease was to cruise odd pieces of state lands which had been sold under contract. "We told him that isolated tracts or pieces of government lands and state land where it was to be sold under contract, were to be cruised. The contract of April 15, 1914, was never modified with respect to the lands it was to cover * * *. The written contract with Mr. Nease was verbally modified to that extent. We usually accepted the suggestion of the assessor in connection with this contract of Mr. Nease. He recommended that these government lands and state lands be cruised."

The plat furnished the cruiser Murray by Nease instructed him to cruise state and government lands

(Tr. 374). These plats were colored so that the government land was indicated in brown and the state lands in red. Nease told the witness Randolph not to cruise any state lands shown on one plat, but that he was to cruise four government forties. (Tr. 248).

Commissioner Harrison testified (Tr. 298), however, "I did not know that he was cruising and charging for lands in the forest reserve, nor for power site along the North Fork of the Clearwater river that were not subject to entry at the land office. I know nothing about what land he was cruising, any more than when he brought in his reports we always saw the assessor and checked up with the assessor. Some report was filed before the board or we just asked Mr. Blake if the check was all right and he said it was. * * * *. We took the assessor's word for it and allowed Nease's bills on the assessor's approval." (Tr. 298).

Commissioner Zelenka testified (Tr. 357) "Sometimes the bills were not checked by the board with the plats because it was pretty hard for us sometimes to go over all of that work, but it was O. K'd. by the assessor and supposed to have been checked exactly."

Nease testified (Tr. 343) that he was told by the

board to include small tracts of government land in the cruise. "The idea being that this land either had been entered or had some sort of scrip filing, or would in the near future pass to patent, and it would then be more expensive to go back and cruise them separately. They did not designate to me specifically what government land I should cruise."

Here Mr. Nease says that he was to cruise only such government land as had some sort of filing and such tracts as might be subject to in the near future pass to patent. Large quantities of land along the North Fork of the Clearwater river had been withdrawn from entry by the federal government for power site purposes and were not subject to entry. This land was cruised by Nease's men, estimates turned into the county, bills allowed therefor, and warrants drawn. There certainly seems to be no valid excuse at all for such work as this. Nease testified (Tr. 350), however, "I did not know at the time I filed my bills with the county commissioners that any of the lands I charged for were embraced in power site withdrawals and not subject to entry, and I do not now know such to be the fact."

Assessor Blake says that Nease was instructed to cruise state and government lands (Tr. 421). How-

ever, Mr. Nease himself testified (Tr. 343) "I did not instruct any of my cruisers to cruise any of the state lands. If any of the state lands were cruised in the work it was through error * * *. There might have been some few pieces of state lands cruised by mistake of the cruisers * * * it was not my intention to cruise any nontaxable state lands, and when I speak of state lands, I mean nontaxable state lands."

Here Mr. Nease contradicts and nullifies the other testimony to the effect that the contract was orally modified.

Notwithstanding this testimony, we have the undisputed fact that a large quantity of state and government lands, viz. 34,386.37 acres, was included in the Nease reports and for this work he received warrants in payment (Tr. 644-6). Nease, however, told Cruiser Wherry (Tr. 257) that "whenever it was convenient to cruise an 80-acre or 40-acre small tract of state land, to cruise it and turn it in"—that they could "get by" with that much." Nease also told Cruiser Layton (Tr. 392) that he could work in a certain amount of state or government land and "he told us that in going over such land, enough to make an estimate, to do so if it was timbered, but if it was not timbered to pay no attention to it." It

seems that Nease not only had great confidence in his ability to "get by" with a certain amount of state and government land, but that he actually did work it through the assessor's office and received warrants in payment therefor. This was contrary to the contract and was done in such a way as to deceive the county commissioners and defraud Clearwater county.

Not only did they cruise and turn in estimates and receive pay for cruising farm lands, burns, marshes, government and state unpatented lands, but they cruised the town of Weippe, situate on the prairie. (Tr. 351).

Appellant apparently conceding the fraudulent and deceitful work of Nease in cruising and charging for state and government land, devotes ten pages in its brief (pp. 78 to 88) to explanation and mathematical computations for the purpose of arriving at a proportionate amount to be deducted from the warrants in the instant case, by reason of the fact that approximately 20,000 dollars worth of warrants had been paid before the discovery of the deceit and fraud practiced upon the county—in other words, the appellant rather admits that a certain amount of government and state land was worked off on the county, but since it had been discovered, and because

Nease might have been paid for some of this fraudulent work, appellant has the temerity to ask that that be whitewashed, ratified, and that it only be called upon to deduct for such portion of state and government land as is shown by the figures in the brief. There is nothing which would accurately show the amount of state and government land included in the warrants in this suit.

We think that the court would not assume the position of expert accountant to protect the appellant in its claim for pay for fraudulent and deceitful cruises in Clearwater county. The foregoing evidence conclusively shows that ample fraud and deceit was practiced upon the board of county commissioners and Clearwater county, notwithstanding the fact that the county assessor might have been aware thereof, to vitiate the entire contract. Clearwater county and the county commissioners did not know that Nease was working all of this land in on them and had no reason to suspect it.

CHECK BY THE COUNTY.

In order to make a showing of good faith, the county assessor deemed it advisable to employ a cruiser to check the work of the Nease men, and Mr. J. F. Gorman (a then resident of Spokane, Wash.)

was hired by the county as its checker. Mr. Gorman was a deputy assessor and made his report to the assessor. Mr. Harrison testified "We inquired from time to time of the assessor how they were getting along and he reported that everything was checking out all right, and that they were cruising the proper lands."

It is necessary that a checker go through the land in the same way that the cruiser did or it would not be a fair check on his work. (Tr. 379).

Taking into consideration the testimony heretofore cited, showing that equally thorough and competent cruisers will vary from ten to three hundred per cent on the same land, on account of perhaps having gone through a different way, and taking into consideration the further testimony that no two cruisers ever get the same amount on the same land, and taking into consideration the further uncountable number of discrepancies found in the Nease cruise, one would naturally suppose that the county checker might, in work extending over the entire summer, find something of a discrepancy in the work of the Nease men of sufficient magnitude to warrant him in calling it to the attention of the county assessor or the board. Not so with Gorman. The as-

essor all the time reported to the board that everything was checking out all right

The deputy assessor (Mr. Gorman) was a business associate of the assessor (Mr. Blake) (Tr. 410) and they were both directors in the Fidelity State Bank of Orofino—the county seat of Clearwater county. Mr. Blake was a cashier of that bank (Tr. 396). When the checker, Gorman, brought reports into the office of the assessor Blake, these reports of checkings were not delivered to the county commissioners but were immediately taken over to the vaults in the bank (Tr. 394). They were never exhibited to deputy assessor, Molloy, and they were not kept in the office as long as deputy assessor, Molloy, was there. They never discussed these reports in the presence of Mr. Molloy and they were never filed in the assessor's office and were never left around the office (Tr. 394).

Commissioner Harlan testified "I have looked in both the recorder's and the Assessor's office and made inquiries of the clerk of the board and the assessor and have been unable to find any such reports * * * * but there was no report we were able to find in respect to any check he made against the Nease cruise." (Tr. 371).

In the winter of 1913 and 1914 this checker, Gorman, had made a cruise, or estimate, of Sections 19, 20-36-4 (Tr. 411) and this was filed in the office of the assessor, yet the assessor permitted Nease to go ahead and recruse this same land.

The assessor checked up the Gorman reports and O.K.'d them, and also his expense account. (Tr. 362).

Commissioner Torgerson testified (Tr. 401) "When we found that Mr. Nease had completed his work and check with the assessor, I went up to the assessor's office and talked with Mr. Blake about it and he said he had carefully checked everything and that as near as he could see, everything was all right * * * inasmuch as Mr. Blake was a county officer, and I believed he would do the best he could and had done right, that it was all right."

Commissioner Harrison testified (Tr. 311) "I did not see Mr. Gorman's reports when they came in, but allowed his bill on the recommendation of the assessor, as Gorman was a deputy assessor."

Mr. Gorman testified, (Tr. 409) "I turned over my reports to the assessor of Clearwater county. They were in ten plat books numbered consecutively from one to ten and they show all of my work * * *

I filed my reports with Mr. Blake, the county assessor at Orofino, and I have not seen them since."

From some note books the witness had with him, defendants found large discrepancies between the reports as turned in by Nease and the record he made (Tr. 408, 409); and he could not tell why the estimate of Section 21 as turned in to the county was not rectified in accordance with his report. (Tr. 410). In fact there is no record of any rectifying ever having been done as a result of the report of this checker.

Assessor Blake testified, (Tr. 422), "I recall there were some discrepancies shown in checking up Mr. Gorman's reports with Mr. Nease's work. I took no action with reference to them that I remember of. I made no change in Mr. Nease's estimates on account of Mr. Gorman, that I know of. I did not consider I had any authority to make any changes in Mr. Nease's work."

The assessor told the individual county commissioners, however, (*supra*) that Nease's work was checking out all right; that everything was fine. Assessor Blake further testified (Tr. 423), "There were some of Mr. Nease's men, two or three of them, whose work was not satisfactory. I did not do any-

thing about it; I think Mr. Nease let them out. I did not ask him to make a recruise on that land."

NEASE AND THE TIMBER COMPANIES.

In so far as the interests of the county were being protected by Assessor Blake and a checker, we find that notwithstanding the fact that there was plenty of room to find discrepancies and incompetent work, nevertheless nothing was done, and no errors were reported to the county commissioners. The timber companies, however, against which this cruise was apparently directed, and whose power was greatly feared, were continuously in consultation with Nease at Spokane, Lewiston and other places. On the 28th day of April, just a short time after the letting of the second contract, is the first record we have of Nease and the timber companies becoming friendly, and a telegram from Mr. Humiston to Mr. Nease bearing date May 10th, says (Tr. 665) "Referring to your proposition of the twenty-eighth ultimo, let me request that you name a time when we can meet in Spokane to check some of your Latah county estimates before turning them in. I now have some interesting reports on the work of your cruisers which will be submitted to you at the time we check estimates. Suggest that this matter

be given prompt attention." signed "W. D. Humiston."

We call the court's attention to the fact that the suit instituted in the name of John Lewis was commenced at the instance and request of Theodore Fohl, the agent for the Clearwater Timber Company (Tr. 318), and that Mr. Lewis stated (Tr. 319). "I had nothing to do with the institution of the suit which was brought in my name, nor with the dismissal of it."

While Assessor Blake deemed it necessary to have a cruise of timber land for assessment purposes, nevertheless, apparently because John Lewis brought this suit, the latter's 300 acres of timber land which before had been assessed at \$3000.00 was raised in the latter part of June to \$10,000.00 (Tr. 318-9).

Appellees contended that while the suit was undoubtedly brought in good faith to stop the cruise, that before cruisers were again put in the field in August, an amicable agreement had been reached between Nease and the timber companies and it was deemed advisable to leave this suit pending to prevent other people from taking similar action. This suit was not dismissed by the timber companies until the completion of the Nease cruise.

Mr. Nease testified (Tr. 334) that when his men returned to work the first of August "I had then no definite information about the dismissal of the suit. The timber companies interested in Clearwater county had said to me that all they wanted was a square deal." It appears that the suit and the appeal from the action of the board of county commissioners were kept alive as a club over Nease until the timber companies had had an opportunity to check up his cruise and see what he was going to report to the county, so that they could tell whether or not they were going to receive a "square deal."

Nease testified, however, (Tr. 334), "I had a conference with Mr. Humiston, the representative of the Potlatch Lumber Company, in Spokane and in Portland and in Lewiston, and on the train, and the suit was generally discussed. I think I first talked to them about it in June. There was no agreement to dismiss it entered into. There was no reason why there should be an agreement. They stated sometime along in the summer that they were going to dismiss the suit."

Mr. Nease referred to his meeting with Mr. Humiston in April, when this suit was discussed, and Mr. Humiston asked Nease to come to Spokane. Nease

testified (Tr. 341) "He says 'it might be advisable for you to meet them, if you wouldn't be afraid to meet them.' I says, 'I have no fear of meeting them at all.' I said, 'I would very much like to meet all parties interested in this litigation and discuss it all, because litigation is expensive and very disagreeable and unpleasant.' So at a later date I received a wire from Mr. Humiston,—I am not sure about that wire, but anyway it is immaterial."

This must be the meeting referred to in the telegram (Deft's. Ex. 28, Tr. 665) supra. Mr. Nease admits that he met representatives of the timber companies frequently and that they frequently discussed this Lewis suit and the cruising of timber in Clearwater county, and that they had promised to dismiss the Lewis suit in the summer. It was not dismissed, however, until October 13th, 1914. About the time the cruisers were leaving the field and Nease was ready to submit his books to Clearwater county he commenced to get uneasy because the Lewis suit had not been dismissed, and on September 8th he wired Mr. Laird at Potlatch (Tr. 663) "Case has not been dismissed as agreed at Spokane conference. * * * "

When was the Spokane conference and what was the agreement?

On October 27th (Tr. 666) Nease in Portland wired Mr. Humiston "Work completed, ready for comparison here October thirtieth and thirty-first November first second." And on the next day (Tr. 666) he wired Mr. Humiston: "Bring figures entire county. We have every township in the county finished. When in Lewiston please call on president Empire National Bank and assure him of legality of cruising warrants explaining to him history of litigation and dismissal.'"

What interest did Mr. Humiston have in these cruising warrants? Why should he be called upon to give his personal assurance to a bank in order to bolster up the question of legality of the cruising warrants? Why should Mr. Humiston be called upon to explain to the bank the history of the litigation and the dismissal. Mr. Humiston was not before the court and we can only draw our conclusions from the interest that the timber companies were taking in this cruise with Mr. Nease.

Mr. Nease gave a partial explanation of why he sent these telegrams (Tr. 336), and he stated: "The purpose of these comparisons was to see how close we ran together and to see if they desired to take advantage of the arbitration clause in the contract or to have a recruse in some manner."

This arbitration clause (Tr. 99 Par. 6) provides:

"It is further agreed by and between the parties hereto that in case any cruise made by the second party, as shown by his reports, shall be disputed and the owner of the timber so cruised desires to have the same recrused * * * * * then arbitrators shall be appointed, and if the recruse varies more than 20 per cent of the amount shown by Nease, then the expense shall be paid by him, otherwise by the county.

We call the court's attention to the fact that under this agreement a *timber owner* was the only individual who could complain or request that a re-cruise be made, and unless such request was made, the county had to accept the cruise.

Nease was allowed a 20 per cent variation, but had his cruisers tied up to a 15 per cent variation (Tr. 113-14) and in that case the cruiser had to bear the expense of a recruse.

The obvious effect of such a clause would be to make assessments low enough so that no one would complain. The cruiser well knew that, taking into consideration all the traits of the ordinary individual, no complaint would be made if less timber were reported to the county than was actually growing upon the tract; hence the large number of under estimates by the Nease men.

It will be noticed that the cruise turned in by Nease was evidently so low and eminently so satisfactory to the timber companies that in not one instance did they ask for a recruise or a recheck. Why were not the individual owners also called into consultation and given an opportunity to show how the Nease cruise compared with their estimates, if any, before these reports were delivered to Clearwater county?

The Nease reports were checked by all of the timber companies (Tr. 337). Mr. Nease explained the lead pencil figures and letters which were on the field reports showing these comparisons (Tr. 327); for instance, referring to field reports on section 12,-39-3E, the comparison figures showed that the Clearwater Timber Company had found 2,495,000 feet of white pine on the northwest quarter, where Nease had reported only 745,000. Many more instances are cited and are in evidence, but it will serve no purpose to cite more of them; it simply shows the trend of the Nease cruise.

If the objection to letting the contract to persons who offered to do the work much cheaper than Mr. Nease, raised by the commissioners on the ground that these parties had worked for a timber

company, were valid, then the Nease cruise deserves no recognition, for the record shows that before the cruise was completed and before the results were delivered to Clearwater county, Mr. Nease had become an associate of these same timber companies. The Lewis suit and the Lewis appeal were dismissed on the 13th of October, 1914, (Tr. 106). The time then for filing appeal from the action of the board of county commissioners had expired and nothing could have kept other interested taxpayers from contesting the validity of the contract better than the keeping of this suit and the appeal on the docket as apparent live issues.

Mr. Harlan testified (Tr. 321) "I advocated letting the contract through competitive bids, and we were thinking of appealing from the action of the board, but thought it was not necessary for us to brings any action because Mr. Lewis had already taken action in the matter."

If the timber companies had dismissed the Lewis suit immediately after making the agreement therefor with Nease at the "Spokane Conference" there is no doubt but that other interested taxpayers would have started another suit at once and in good faith presented all of these legal questions to the court.

ARGUMENT.

We will endeavor to follow the order and reply to the argument of appellant as presented in its brief.

Appellant's contention is that a cruise of the growing timber upon timbered lands is indispensable to enable the assessor to arrive at a true valuation of the timbered lands in the county and unless this proposition is firmly and clearly established, appellant's case must fail. One of the major defenses sustained by the lower court is that the cruising of the timber (which is in effect a listing of the property) was performed by non-residents of the state of Idaho, who were neither assessors nor deputy assessors, contrary to the Idaho law. This point is argued under specifications of error, II (A), beginning at page 47 of appellant's brief. Appellant says (page 48) "It is conceded that the cruise was made for the use of the assessor and the board of equalization in assessing the timbered land of the county for the purpose of taxation." Appellees make no such concession. We admit that the assessor demanded that the county commissioners arrange for a cruise of the timbered land and that a contract between the county and M. G. Nease was entered into

for that purpose, but we deny the conclusion that the cruise was made for the use of the board of equalization in assessing timber lands.

It must be conceded that where the statute specifically requires that a certain method be followed, other and less formal methods must be excluded. "When the constitution devolves a duty upon a particular person, the legislature may not substitute any other person to perform that duty." *Bloomquist v. Board of County Commissioners*, 25 Idaho 284-293. The statutes of Idaho have specifically declared that whenever an assessor shall require assistants that advertisement shall be made and the salary fixed by the board.

Section 2119 of the Revised Codes of Idaho, as amended by chapter 127 of the Laws of 1913, (page 474) :

"The sheriff, assessor * * * * shall be empowered by the board of county commissioners to appoint such clerical assistance as the business of their office may require, and deputies to receive such remuneration as may be fixed by said board of county commissioners, which remuneration shall be paid quarterly in the same manner as the salaries of the county officers are paid: PROVIDED, That any of the officers mentioned in this section requiring the services of one or more deputies or requiring clerical assistance shall, for a period of at least thirty

'days before any regular meeting of the board of county commissioners, publish a notice in some newspaper at the county seat, or if no newspaper is published at the county seat, then in some other newspaper published in the county or if no newspaper be published in the county, then by posting a notice in his office for a period of thirty days before said regular meeting, of his intention to apply to the board of county commissioners for a deputy or deputies or for clerical assistance, and no deputy shall be appointed or clerical assistance allowed by said board until due proof of the publication of said notice shall have been furnished said board and the necessity for said assistance is satisfactorily shown, and any tax payer in the county shall have a right to appear before said board and protest against said appointment and show cause why said assistance should not be allowed."

Section 6 of Article 13 of the Constitution of the state of Idaho provides that

"The Legislature, by general and uniform laws, shall provide for the election biennially in each of the several counties of the state * * * * a county assessor who is ex-officio tax collector * * * * ."

It goes without saying that the reason for the enactment of this law was to prevent county officials from giving employment to favored persons at exorbitant salaries, and in the present case, as near as appellees could determine, the Nease cruise cost only about eighteen thousand dollars, and the timber land

could have been classified, and the burns, marshes and clearings located (without a cruise) for perhaps two thousand dollars, with a saving to the county of about sixty-one thousand dollars.

Appellants admit and the record proves that the assessor and the county commissioners did not in any manner attempt to follow the provisions of the foregoing statutes. This was not on account of inadvertence or lack of knowledge, but by a wilful and intentional attempt to evade the mandatory provisions of the law. The requirements thereof had been brought to their knowledge by the allegations in the John Lewis suit, so that they had ample time to protect the county in the expenditure of its funds if they so desired.

Appellant argues that a cruise is necessary for the use of the assessor and the board of equalization. He fails to carry the distinction between the duties of the assessor and the board of equalization.

“Before taxes can be levied upon any property the property must be assessed; that is, the property must be listed for taxation. Under our constitution this duty devolves upon the officials whose title of office indicate that duty; to-wit: the assessor. And where the constitution provides a scheme or frame work for the mechanical administration of the laws of the state the legislature can-

not substitute another method therefor." "The assessor is required to assess the property in his county at its actual cash value according to his honest opinion and best judgment and if the opinion of the tax commission is different from that of the assessor, the tax commission cannot compel the assessor to change such assessment and conform to the opinion of the tax commission."

Bloomquist v. Board of County Commissioners, 25 Idaho, 292-3 Supra.

The argument of appellant that the board of county commissioners would be authorized to go in debt to have a cruise of the timber lands made in order to enable it to perform its functions as a board of equalization is absolutely without merit. Even with the most accurate cruise and estimate made, it could not, if its opinion differed from that of the assessor, compel the assessor to substitute its opinion for that of the assessor so long as the assessor had performed his duties in good faith and according to his best judgment and discretion.

"An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the District." * * * As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the

tax between them. When this listing and estimate are completed in such form as the law may have prescribed, nothing remains to be done, in order to determine the individual liability, but the mere arithmetical process of dividing the sum to be raised among the several subjects of taxation, in proportion to the amounts which they are respectively assessed."

Cooley on Taxation 3rd Ed. p. 596.

Article 3 of Chapter 58 of the Laws of Idaho for the year 1913 requires the assessor to assess all real property in his county, and "in making such assessment the assessor shall actually determine, as near as practicable, the full cash value of each tract or piece of real property assessed and shall enter the value thereof, and the value of the improvements thereon * * * * * in appropriate columns against the description of such real property in the real property assessment roll."

From the foregoing provision it will be seen that it is the duty of the assessor to "actually determine." Here the law is specific, and no one but the assessor has any right or authority to even list or attempt to place a valuation upon the property in the county. By this section the assessor is only required to place a valuation upon such property "as near as practicable."

"The words "assessor" and county "board of equalization" as used in *the constitution*, carry with them the powers usually conferred upon officers or boards of like names. Under Sec. 6, Art. 18 of the constitution, *it is essential that the assessment of property located wholly within a county shall be made by the assessor*

elected by the voters of the county, and if the assessor has no discretion in placing a value upon the property assessed, he is nothing more than a listing officer, without any power to assess property at its cash or any other value according to his best judgment or legal discretion." * *

"Before taxes can be levied upon any property, the property must be assessed; that is, it must be listed and valued for taxation. Under our constitution this duty devolves upon the officers whose title of office indicate that duty, to-wit, the assessors. The legislature cannot assess property nor can any appointive board assess property for taxation under the constitution of the state of Idaho, and the essential duties of an assessor and a county board of equalization must be preserved until a change is made by proper amendments to the state constitution. Bloomquist vs. Board of County Commissioners, 25 Idaho, 284-292.

The Nease cruisers not only acted as listing officers in cruising timber for the assessor, but also exercised their own judgment as to whether or not property should be listed at all. In these particulars, they clearly usurped the functions of the county assessor. He had no opportunity to exercise that discretion devolved upon him by the constitution of the state of Idaho.

Appellant argues that because the assessor is required by the laws of Idaho to assess lands "at their full cash value" that it is absolutely necessary

to have growing timber on timber lands cruised to enable the assessor to arrive at that valuation. Appellant states the proposition but does not prove it. Assessors have always been required to assess property at its real value,—cash value or true cash value,—but the method of arriving at such valuation has been left to the honest discretion and best judgment of the assessor. And when the assessor has so acted, the result cannot be questioned. Real estate, under the laws of Idaho, is divided into different classes for the purpose of assessment, and a portion of chapter 58, laws of Idaho, 1913, provides:

Section 48. "For the purposes of assessment lands shall be classified as follows:

"A. Agricultural land, being land used or susceptible of use for general agricultural purposes, including land in use or susceptible of use for orchard or vineyard purposes, and land used or susceptible of use for scientific dry farming.

"B. Timber land, being land on which there is standing timber of commercial quantity and quality.

"C. Cut-over and burnt timber land, being land from which timber has been cut or burned, leaving nothing but stumps and burnt timber, and which burnt timber is not at the time of the assessment useful for any commercial purpose. Where timber land is held under separate ownership from the timber thereon the land itself shall be classified under this heading.

"D. Mineral land, being land used or susceptible of use for mining.

"E. Grazing land, being land not used or susceptible of use for agricultural purposes and which is useful only in large areas for stock grazing.

"F. Waste land, being land not susceptible of use for agricultural or commercial purposes.

"Lands in cities, towns, villages and town-sites:

"G. Business lots, being such lots as are situated in a commercial section, and actually used, or best susceptible of use for business purposes.

"H. Residence lots, being lots in a generally settled residence district, and lots platted for residence purposes.

"Section 49:

"* * * * * The assessor shall exercise his best judgment in classifying land in accordance herewith, but the classification made by him may be amended or revised, and a new classification made, or the classification of any particular tract or lot changed by the Board of County Commissioners, if in the judgment of such board such land has not been correctly classified in accordance with the provisions of the preceding section."

"Section 50:

"In case standing or growing timber is owned separately from the ownership of the land on which it stands or grows, such timber shall be entered upon the real property assessment roll

separate and apart from the land, and the number of acres and the value thereof entered in columns provided for that purpose."

Sec. 6. Real property for the purposes of taxation shall be construed to include land, and all standing timber thereon, including standing timber owned separately from the ownership of the land upon which the same may stand, and all buildings, structures and improvements, or other fixtures, of whatsoever kind on land. * * "

Sec. 8. "By the term "improvements" is meant all buildings, structures, fixtures and fences erected upon or fixed to the land, and all fruit, nut-bearing and ornamental trees or vines not of natural growth, growing upon the land, except nursery stock."

Section 48 *supra*, requires the classification of land but does not say that improvements or growing trees shall be counted listed, or assessed by any particular method. If appellants argue to the effect that it is necessary to count and list the number of board feet of growing timber on timbered land, then with equal force may we argue under the provisions of section 8 *supra*, that it would be necessary for the assessor to compute the actual value of fences, and count, weigh, or measure all of the nuts on nut bearing trees and all of the fruit upon the fruit trees, and also measure or weigh the produce upon the agricultural land so that he might determine whether one quarter section of wheat land should be assessed

at a very different valuation from an adjoining section. The law does not require the assessors to have annually such detailed and expert opinion in order that they may make their assessment.

“VALUE, HOW ASCERTAINED. As to the methods of arriving at the value, little is to be said. There are no definite rules on the subject unless the statute has prescribed them, but the assessor is to value the property according to his best judgment and with honest purposes.”

Vol. 1. Cooley on Taxation 3rd Ed. p. 754.

In *Peninsula Iron vs. Crystal Falls Township* 60 Mich. 510, it is held that the assessor is not required to perform impossibilities and that he need not examine personally each parcel of land in a township, and an assessment of “uncut” land uniformly through the township at a certain price per acre was sustained.

In *Keokuk & H. B. Company v. People*, 161 Ill., 514, it is held that where the statutes provide that certain bridges are to be assessed as real estate that the assessor shall actually view and determine *as nearly as practicable* the fair cash value of real estate listed for taxation, the assessor need not employ bridge experts for the purpose of ascertaining the value of the bridge.

In the making of assessments of real property we must take into consideration what is required of the assessor and a reasonable way to perform his duty without making the cost of such performance a burden in itself. It would not be good business to annually spend more for

expert assessors than the tax to be recovered therefrom was worth.

From the Idaho statutes on the assessment of real property, it conclusively appears that all the statute requires is that the property be classified and that after such classification has been made the assessor shall determine "as near as practicable the full cash value." The assessor must also determine the value of buildings and improvements. Two buildings side by side on the same street with the same frontage might have an outward appearance which would make them of equal value and might have floor space which would make them of equal rental value. The one might be weakened and nearly ready to fall down and the other one might be of recent construction and in condition to produce rentals and income for a period of from 40 to 50 years. Would it be supposed that the assessor should hire architects and builders to annually examine each building to determine its true cash value? Certainly not. He is only to value them as he sees them and make an honest endeavor to place a valuation according to his best judgment.

Appellant with great candor states in its brief (page 57) that the assessor may secure information from any source in order to enable him to make a

proper assessment of property. This is true. He is given wide latitude and discretion in listing, classification and valuation. He can inquire of his next door neighbor or anyone else, or he may be satisfied with the opinion of the owner as is stated by the appellant, but if the assessor is unable to make lists and valuations either from his general information or from the sworn statements made by the property owners, together with the information then before him, he is authorized to hire or employ deputies to assist him in this work. He must comply, however, with the laws of 1913, chapter 127 *supra*.

The county assessor of Kootenai county also prevailed upon his commissioners to enter into a contract with one Pelham for the cruising of timber lands in that county. Action was brought by J. C. White against the Board to prevent the payment of certain warrants which had been issued to Mr. Pelham for estimates on timber land on the ground that the board had not followed the law with reference to making the appointment, and fixing the salary of the deputies; and that the cost of such work exceeded the income and revenue of the county in violation of Section 3, Article 8 of the Idaho Constitution. The assessor in this case, however, had made an honest attempt to comply with the law with reference to

the publishing of notice for the appointment of deputy assessors, and it was his intention that Pelham and all persons cruising timber should be sworn in as deputy assessors. The action came on for trial and the district court sustained the contention of the plaintiff and held the warrants illegal and void. Decree was signed by the Hon. John M. Flinn and filed May 11th, 1914. The court in its decision reviews the facts and says:

“Our Supreme Court states:

‘Section six of article eighteen evidently contemplates that a necessity may arise for the appointment of a deputy sheriff. It also contemplates that, when it is made to appear to the county commissioners that the services of a deputy are necessary to the proper conduct of the business of the sheriff’s office, they may empower the sheriff to appoint such deputy and may fix the salary of such deputy. However, before the county commissioners are authorized to empower the appointment of a deputy, they must find that the business of the office requires the assistance of one.’

‘Or, in other words,’ as was said by the court in the same case: ‘That a necessity exists for the appointment.’

Taylor v. Canyon County, 6 Idaho, 466.

“Other cases recognize the principle that the ne-

cessity for appointment must be found, and are the following:

Colm v. Kingsley, 5 Idaho, 416.

Dunbar v. Canyon County, 6 Idaho, 725.

“In view of the foregoing constitutional and statutory provisions as construed by our own supreme court, it is apparent that before any of the officers mentioned can employ deputies, or procure clerical assistance, *they must be empowered by the board of county commissioners to appoint such deputies and clerical assistance.*

“It is further plain that the remuneration of such deputies must be fixed by the board of county commissioners and paid in the same manner as the salaries of county officials are paid.”

STATUTORY ASSISTANCE AND INSTRUCTIONS FOR THE ASSESSOR.

“Sec. 15. In ascertaining the value of any property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation * * * but he shall value each article or piece of property by itself and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made.”

“Sec. 16. The assessor shall call at the office, place of business or residence of each person required by this Act to list property, if such person is a resident of the county, and shall require such person to make a correct taxpayer's statement of such property, in accordance with the provisions of this Act; and every person so required shall enter a true and correct state-

ment of such property and the ownership thereof in the form prescribed, which statement shall be signed and verified by the oath of the person listing such property, and shall be delivered to the Assessor, who shall thereupon determine the value of such property and enter the same on the assessment roll; * * * " (p. 179).

Sec. 20. Any property, wilfully concealed, removed, transferred, misrepresented, or not listed by the owner, or the agent or representative of the owner, to evade taxation for the current year, or in any preceding year or years, must upon discovery be assessed at three times its value for each year such property has escaped assessment, and the assessment so made must not be reduced by the Board of County Commissioners. (p. 180).

Sec. 21. If any person required by this Act to list property shall be sick or absent when the Assessor calls for a taxpayer's statement of such property, or if such person is not a resident of the county, the Assessor shall leave at the office, place of business or residence of such person, or mail to such person at his last known post-office address a blank taxpayer's statement and a written or printed notice requiring such person to make out and deliver to the assessor, on or before some day named therein, the statement required by this Act. If such person failed to make out and deliver such statement as required, the Assessor may list and assess such property according to his best judgment and information. (p. 180).

Sec. 22. The assessor is hereby authorized to administer oaths to all persons who, under the provisions of this Act, may be required to swear, and he may examine under oath any per-

son who is required under the provisions of this Act to list property, concerning the amount and value of such property, and he may examine under oath any person whom he may suppose to have knowledge of the amount or value of the property of any person refusing to list such property or to verify such list as provided by law, or whenever the Assessor shall be of the opinion that the person listing the property for himself or for any other person has not made a complete list of such property. If any person shall refuse to answer under oath any question asked of him by the Assessor concerning the amount and value of the property required to be listed by him, and a full discovery made, the assessor may list and assess such property according to his best judgment and information. Any person making a false list, schedule or statement under oath shall be guilty of perjury. (p. 180-1.)

The evidence shows that before Mr. Nease delivered the result of his cruise to Clearwater county representatives of all of the timber companies assembled in Portland, Oregon, and compared their cruise with Mr. Nease's and found that the estimates of the timber companies were in practically all instances much higher than the Nease cruise indicated. The foregoing sections give the assessor ample authority to require these timber companies to bring their estimates and submit them to him, if, under the law, it was necessary for the assessor to know the quantity of standing timber on each individual tract.

THE IDAHO TAX COMMISSION.

It is conceded that only a very small portion of timber in the state of Idaho was, or ever has been, cruised for assessment purposes. At the time of the enactment of the laws which appellant contends imposed such drastic duties on the assessor, there was also created in Idaho a tax commission which commission was empowered to supervise the administration of all laws relating to the assessment of property and levy of taxes—see Idaho session laws, 1913, chapter 57, page 168, et seq.

Sec. 1. There is hereby created for the state of Idaho a State Board of Tax Commissioners to be known as the "Idaho Tax Commission," and the said Board shall have and exercise the powers and perform the duties hereinafter prescribed.

Sec. 8. The Commission shall supervise the administration of all laws relating to the assessment of property, and the levy, collection, apportionment and distribution of taxes, and shall exercise power and authority to enforce all such laws, and in so doing shall oversee all boards of assessment, boards of equalization and all officers upon whom any duties devolve under the revenue laws of this State, and require all such boards and officers to perform the duties imposed upon them by such laws, and may examine all books, records and accounts of such boards and officers, and require such boards and officers to furnish the commission such records, data and information

as may be had from the records in their several offices and as the commission may deem necessary. (p. 169).

Sec. 11. Any taxpayer or officer in this state shall have the right to make complaint to the Commission, of the failure or neglect of any officer upon whom any duties devolve under the revenue laws of this state, to perform such duties. (p. 170).

Sec. 9. *The Commission shall prescribe a uniform system of procedure in the assessment of property and the levy, collection, apportionment and distribution of taxes, and shall prepare and supply to the State Auditor the forms of all books, records and blanks required by the revenue laws to be used and no other system or forms shall be used than those prescribed by law and prepared by the Commission.*" (p. 169). (All italics ours).

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Appellant~~ants~~ contended that section 9 supra prohibited the use of any system for the assessment of property other than the standard and well recognized methods. It is conceded and the records prove that the other counties in the state were not assessing timber lands on a cruise, and it developed at the state board of equalization meeting that while Clearwater county and a small portion of other lands had been cruised, that the balance of the state was assessing timber lands by blanket assessments. If Assessor Blake had conceived that a cruise was absolutely necessary and that he might be subject to pun-

ishment if he did not have a cruise made, it would seem that he could easily have protected himself by making application to the Idaho Tax Commission for recommendations as to a uniform system for assessing timber land, especially so in view of the mandatory provision of section 9 supra that no other system should be used. It would seem useless to carry the argument further, or cite more authority than the foregoing, to conclusively prove that the Nease contract was made in absolute violation of the then existing laws of the state of Idaho, as interpreted by the decisions of its supreme court. Taking into consideration the evidence as adduced not only by the field reports given by the cruisers to Nease and by the reports delivered to the county, and also the testimony of the cruisers themselves, the work was so inaccurate and void of uniformity that it could not be relied upon by the assessor because it was proved beyond peradventure that the cruising of the timber in Clearwater county was nothing more than conjecture. If the listing of property was necessary, certainly that listing must not consist of variations of from twenty-five to eight hundred per cent. on individual governmental subdivisions. The lower court said: "If a detailed cruise of timber lands was deemed to be essential, why was it not also required, with

proper provision for uniform reports thereof? If cruises are to be made, it is important not only that they have the sanction of law, but also that they be required of all counties, and be made and reported according to some uniform system, so that they may also serve as the basis of state equalization as well as for local purposes."

WHO MUST DO THE ASSESSING.

At page 60 of its brief, appellants refer to case of *State vs. Goldthait* wherein the supreme court of Indiana held void a contract for the employment of a private person to procure a particular kind of information on the ground that "The assessor was specifically required by statute to do the precise thing, (i. e., search the records) that the private party was required to do."

The contract was a direct infringement upon the functions of the assessor. "The distinction between that case and the case at bar is clear." The distinction may be clear to appellant but from the point of view of appellees it seems that the case sustains our contention. Our constitution and laws as interpreted by our supreme court (*Bloomquist v. Board of County Commissioners supra* decided in November, 1913) held that before taxes can be levied

upon any property, the latter must be *listed and assessed by the assessor*, and therefore no other person has any authority to exercise those functions. Patrick Blake and his duly appointed assessors were by law required to do the assessing and not itinerant cruisers from Oregon.

Page 62 refers to the suggestion of the lower court that the cruise did not have the sanction of law and impliedly argues that no cruise could have a sanction of law which would be binding upon future generations, but this leads to the other point of inquiry that if to assess land costs more than the entire income to be derived therefrom, then there is manifestly something wrong in the requirements of the statutes. The legislature certainly never intended the county to expend sixty-three thousand dollars for the purpose of collecting thirty thousand. Appellant also says that the information was secured for the county commissioners so that they would be in a position to see that the valuation placed upon each piece of property was correct. Section 62 of the revenue law referred to provides :

“The Board of County Commissioners in session as a board of equalization may require the attendance of the County Recorder, who must furnish the said board with any information which may be had from the records in his

office and which the said board may deem necessary in equalizing the assessment, and may also require the attendance of any other county officer or deputy whose testimony may be needed, and may also subpoena witnesses and hear evidence in all matters relating to the assessment of property, and may arbitrarily value and assess the property of any person refusing to appear or testify, and any assessment so made shall be conclusive on all questions of valuation and assessment in any court or proceeding."

This law directs that the county commissioners sit as a board of equalization, exercising the same functions that it has exercised for years. It acts as a judge and if it has information gathered from any source whatever that the assessor has in any particular instance erroneously classified any tract of land or placed an erroneous valuation thereon, it can make the necessary change. The section, however, gives an added reason why the listing of property should be performed by deputy assessors—residents of the county. It empower the commissioners to subpoena witnesses. The Nease cruise not having been performed by any assessor or deputy assessor, or resident of the state the county commissioners would therefore be powerless in any particular instance to subpoena the person who made the cruise.

Appellant quotes at length from the memorandum decision of Judge Netterer in Pacific Timber

Cruising Company v. Clarke County, 223 Federal 540, wherein the decision was rendered on a demur to the complaint and the court held, "That under the laws of Washington the county commissioners were empowered to have the timber land cruised." None of the collateral questions were presented to the court as arose in the *Nease* case. Under the Washington law property is not classed as it is in Idaho. In Washington, as in Oregon, the county commissioners are the chief executive officers of the county. The management of the county's business is invested in them by law. (Section 3890 R. & B. Code).

In Idaho the county commissioners are not concerned with the assessment and taxation of property except as they are given power to "super-
vise" the county officers, and to sit as a Board of Equalization after the annual assessment has been made and submitted by the county assessor. (Sec. 1917). While sitting as a Board of Equalization the commissioners constitute a distinct body from the Board of County Commissioners.

Gen. Custer Mining Co., 2 Ida. 40; 3 Pac. 22.

If the commissioners have the power contended for in this case, it must be by virtue of their power to equalize the taxes rather than under the general supervision of county officers. And any contract entered into by them in the exercise of this power of equalization should be entered into by them as a Board of

Equalization and should be authorized by them while sitting as a Board of Equalization.

NEASE CONTRACT PROHIBITED BY THE
PROVISIONS OF SECTION 3, ARTICLE 8
OF THE CONSTITUTION OF THE
STATE OF IDAHO.

Appellant, at page 65 of its brief seeks to bring itself within the proviso of this section and attempts to prove that the cruising of timber in Idaho is a necessary and ordinary expense authorized by the general laws of the state. Section 3 of article 8 of the constitution of the State of Idaho is as follows:

Sec. 3. "No county, * * * * shall incur any indebtedness or liability in any manner or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose * * * *. Any indebtedness or liability incurred contrary to this provision shall be void; *PROVIDED that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state.*"

Appellant concedes that unless it conclusively proves that the expense for the cruising of timber was a necessary and ordinary expense under the Idaho constitution, the decision of the lower court must be affirmed. It cites the case of *Wingate v. Clatsop*

County, 71 Oregon 94. The constitution of the State of Oregon prohibits the creation of debts or liabilities in excess of five thousand dollars except by the approval of a majority voting on the question. The supreme court of that state has in a number of cases evaded this constitutional prohibition by an interpretation to the effect that the provision would not apply if the indebtedness was involuntary and the court kept relaxing the provision until they have decided in the case cited by appellant that an indebtedness for cruising of timber was valid. We think that the supreme court in that case went beyond the purport of its decisions in former cases. The constitutional provision is plain and it seems to appellees that the real gist of the decision of the supreme court of Oregon upon their constitutional provision was set forth in the case of *Eaton v. Minnaugh* 73 Pac. 754 where the court says:

“Generally speaking, it may be said that a liability imposed upon a county by law, which it is not at liberty to evade or postpone, is involuntary, and not within the terms of the Constitution. But a liability arising from the performance of some public duty of a discretionary character, or which the county authorities may, in their discretion, postpone indefinitely or *temporarily until means are provided for the payment of the expense* incident thereto, cannot be so held.”

In this case the court holds that if the county cannot postpone the liability, the constitutional provision does not apply; but if the county authorities, "may in their discretion postpone indefinitely or temporarily until means are provided for the expense incidental thereto" then it cannot be held to be an involuntary indebtedness.

Under the laws of Oregon we contend that the cruising of timber for the use of the assessor could have been temporarily postponed until means were provided for the payment of the expense incidental thereto. We fail to see how the supreme court of that state in view of its former decisions could hold that the cruising of timber (an act which had never been previously performed by the county assessor and which might never be performed again) could not be postponed long enough to provide for the holding of a bond election for the payment of the cost thereof.

The lower court says that the Oregon supreme court had in the Wingate case gone far beyond the reasoning of its former holdings and without quibbling over differences in phraseology, conceded that the limits in the Oregon constitution were equivalent to those in the Idaho constitution, and said, "But,

with all due respect for the court, the reasoning by which the conclusion is reached that the cruising of timber lands constituted a duty which the defendant county could not postpone,—I have been wholly unable to appreciate. It seems to me to entirely break down the protection which the constitutional provision was intended to vouchsafe.”

Appellees have referred to the two cases cited by the appellant to show that they cannot be considered as authority in the case at bar. For a recognized interpretation of the section of the constitution together with its proviso, we look for guidance to the constitutional debates and to the decisions of the supreme court of Idaho. There are appended hereto excerpts from the debates at the time of the adoption of the constitution, and from an examination thereof it will be seen that the constitutional convention had in mind that only such expenses as were necessarily incurred in carrying on the county government, such as salaries of officers or other like expenses, would be considered as ordinary and necessary, and that before any other indebtedness was created it should be authorized by an election held for that purpose. This provision of the constitution together with its proviso, received deliberate consideration from the convention, and the framers of the constitution in-

tended to safeguard the treasury and protect the interests of the public from hasty and improvident contracts such as the one with Nease. The framers of the constitution adopted a "pay as you go plan," and intended that the county should be placed upon a cash basis. The decisions of the supreme court of the state of Idaho (and I might add the district courts as well) have in every instance where there was a question of doubt as to whether an indebtedness in excess of current revenues was an ordinary and necessary expense, resolved that doubt in favor of the taxpayers of the county.

In commenting on the decision of *Hickey v. Nampa* 22, Idaho, 41-124 Pac. 208, the lower court said, "An expense is ordinary if it is in an ordinary class, if in the ordinary course of the transaction of municipal business or the maintenance of municipal property, it may and is likely to become necessary. It will further be assumed that if by law a specific duty is imposed and the mode of performance is prescribed so that no discretion is left with the officer, the expense necessarily incurred in discharging the duty is a necessary expense."

In section 2 of the syllabus, *ex parte Bossner*, 18 Idaho, 519, 110 Pac. 502, it is said:

“Words used in a statute without any technical meaning or application should be given their ordinary significance as they are popularly understood, and the language used by the Legislature must be considered in the light of the common acceptance of the terms employed.”

If the cruising of timber was considered a mandatory requirement upon the office of the assessor in the year 1914, what was the urgent necessity which required the letting of the contract and the creation of the indebtedness without submitting the question to the vote of the people as is provided by the constitution. Bond elections can be readily held and if there was an absolute necessity for the cruise, the people would have authorized the expense. The election could have been held between the first of February and the sixth of April very readily, but the evidence conclusively shows that the county officers were going to have the timber cruised regardless of the mandatory provisions of the law, the state constitution, the decisions of the supreme court, the pending injunction suit against them, the condition of the treasury, and the rights of the taxpayers of the county whose financial interest they were sworn to protect.

In *Bannock County v. C. Bunting & Co.*, 4 Ida. 156, 37 Pac. 277, the court said:

"The item \$435.09, warrant No. 58, was issued to pay for a temporary jail. It is the duty of the commissioners to provide a place for the safe keeping of prisoners. A jail cannot ordinarily be hired, as buildings suitable for jail purposes are not erected by private parties. The above amount might very properly be expended, when necessary, for repairing a jail already built; and as it was paid for a temporary jail, and is certainly a small expense for such a purpose, we think it should be held to be an ordinary and necessary expense, and authorized by the constitution.

Objection is also made to warrant No. 138 for \$4000, issued for the purchase of a block of land in the town of Pocatello, as a site for court house. This is clearly not among the ordinary and necessary expenses of the county.

* * * * *

In the case of *County of Ada v. Bullen Bridge Co.*, 5 Ida. 79, 47 Pac. 818, the court said:

"If it is claimed that this expenditure comes within the proviso of section 3, Art. 8, of the Constitution, we answer that a construction of that proviso as well as of the entire section, was given by this court in the case of *Bannock Co. v. Bunting* (Ida.) 37 Pac. 277, and we would suggest that an improvement involving an expenditure of nearly \$40,000, where the revenue of the county for the year was only about \$70,000, would not readily be classed as an "ordinary and necessary expense." It would be difficult, we apprehend, to name an expense under such a construction that would not be "ordinary and necessary." If a necessity existed for the bridge,

there was no conceivable excuse for not complying with the plainly expressed provisions of the constitution and the statutes. If these provisions of law are to be ignored or defeated upon flimsy technicalities, it is difficult to see what protection the people will have."

The final judgment of the court, in the case last cited, was afterward reversed on re-hearing, but on a question of procedure.

In the case at bar the total liability under the Nease contract was approximately \$63,000.00, and the total current expense appropriation was very much less than that as was also the actual revenue accruing to the current expense fund for that year. The auditor's report (in evidence) shows that, at the end of the 1914 fiscal year, the county had \$135,000.00 in warrants outstanding and unpaid, and only \$10,000.00 in the treasury applicable to the payment thereof. **THAT THE COUNTY HAD A FLOATING DEBT**, in other words, of \$125,000.00, half of which was caused by the letting of this Nease contract.

The county commissioners of Clearwater county, without making any provision for payment, incurred in addition to the ordinary and necessary expense for the year 1914 amounting to about fifty-nine thousand dollars, the further indebtedness of sixty

three thousand dollars for the Nease cruise. The auditor's report shows that after making the maximum levy and adding the receipts from other sources, only \$53,310.06 came into the county treasury to satisfy an indebtedness of \$122,352.76. It would seem that one would have but little hesitancy in reaching the conclusion that the incurring of the indebtedness for the cruising of timber was neither necessary nor ordinary. An emergency might arise which would justify the issuance of warrants to the amount of \$122,352.76 against an available revenue of \$53,310.06 but such an emergency did not confront Clearwater County in 1914. The statutes provide a safe and just method for the appointment of deputy assessors and the constitution provided a safe, and easy method of providing the cost of a cruise if it were necessary.

Notwithstanding the fact that the evidence conclusively shows the Nease cruise to be incompetent and inaccurate and in addition thereto that fraudulent acts were committed by Nease and his men in the preparation of his reports and in "working in" a certain amount of state and government lands contrary to the terms of the contract, appellant contends that because the bills were allowed and warrants drawn, the county is estopped from attacking the validity of the contract.

In *Dunbar v. Board of County Commissioners*, 5 Idaho, 415, the court uses the following language:

“Where a board of commissioners, in violation of the constitution, incurs a large debt in excess of the revenues for the fiscal year in which they assume to incur such debt, without submitting the question of incurring such debt to the voters, and providing for payment of the interest and principal thereof, as provided by the plain provision of the constitution and statutes of the state, such board is not acting within its jurisdiction; and the action of the board in making such an order is void, and may be *attacked directly, indirectly or collaterally, at any time or place*. To hold otherwise would give the boards of commissioners power to do indirectly what the constitution forbids.”

The court also said:

* * * * *

“In solving this question it is necessary to determine whether the building of a bridge, and the payment of bounties for rabbit scalps, are ordinary and necessary expenses of a county. It will be seen that the two terms are used conjunctively; hence, to come within the constitutional proviso or exception, expenditures made in excess of the revenues of any current year must not only be for ordinary expenses, such as are usual to the maintenance of the county government, the conduct of its necessary business, and the protection of its property, but there must exist a necessity for making the expenditure at or during such year. In the case of *Bannock Co. v. C. Bunting & Co.*, 4 Idaho, 156, 37 Pac. 277, this court, in construing section 1762 of the Revised Statutes, held that the purchase of a site

for a county courthouse, and building a courthouse, "is clearly not among the ordinary and necessary expenses of the county." In that case this court further said: "It is clear that, if the commissioners could incur a debt for a courthouse site at a cost of \$4,000, they might purchase one at a cost of \$10,000, and proceed to erect a courthouse at a cost of \$20,000, all of which would be in direct violation of the constitution. It is, of course, the duty of commissioners to provide a suitable place for holding of the courts and public offices, jails, etc.; but such rooms must be temporarily provided, at as little expense as is consistent with providing suitable quarters, until the question can be submitted to the people." What has been said with reference to building a courthouse applies to the building of a bridge or other public improvement, within the letter and spirit of the constitution and statutes. We conclude that the building of a bridge and the payment of scalp bounties are not ordinary, but extraordinary, expenses, and, being such, cannot be created in excess of the revenue for the fiscal year in which they may be incurred without the assent of two-thirds of the electors of the county voting at an election duly called and held.

* * * * The framers of the constitution intended that the several counties of the state should be placed upon a cash basis, and that the incurring of heavy debts by the counties should not occur unless the people of the county should so authorize."

The county assessor was by law required to determine the actual cash value "as near as practicable." He certainly was not required to hire expert

timber cruisers for the timber land, horticultural experts for the agricultural land, mineralogists for the mineral land, veterinary surgeons or experts in the knowledge of value of animals for the livestock, or architects to determine the value of buildings and improvements, or experts to determine the valuation of any particular class of property or improvements. To strictly follow the mandatory provisions contended for by appellant would bankrupt any county in the state. It would lead into unknown fields wherein the revenues of the counties in any particular year would be insufficient to blaze a trail through the entangling growth of deceit, fraud and expenditure. To conceive for a moment such a municipal bankruptcy is a sufficient answer to appellant's reference to that portion of the decision of the lower court in its brief, pages 73-4.

Appellant's contention is further answered by the facts in the case which conclusively show that no two cruisers could arrive at anywhere near the same results, even though walking over the same land at the same time and under identical conditions. Why should a county incur an indebtedness of sixty-three thousand dollars for a cruise to assist its assessor in arriving at the valuation of timber lands if the cruise is inaccurate and such a sham that one of

Nease's best cruisers found and reported 500,000 feet of fir, and another equally competent cruiser, found 110,000 feet of fir on a single forty acre tract of land? If this is a necessary expense where in the realm of speculation are we going to stop?

Appellant says (pp. 58-59) "It must be conceded that the assessor himself cannot be compelled to cruise all the timber lands in Clearwater county." This is our contention exactly. If he could not be compelled to cruise all of the timber lands then it would not be deemed necessary to literally follow the requirements of the statute cited by appellant, and the conclusion in the Wyngate case, must fall.

Appellant further says, "No doubt any assessor of any county in the state of Idaho has the right to cruise all of the timber lands in his county for the purpose of enabling him to properly classify and assess them. He is doubtless privileged to do so if he has the ability and the means but he is not specifically so required." The qualifying statement, "If he has the ability and the means," is rather significant in view of the requirements of our constitution quoted. We admit that if the assessor follows the requirements of the statute in appointing his deputies (which corresponds to the "ability") and has

sufficient funds in the treasury to pay the cost thereof (corresponding to the "means"), then he can have just as much timber land cruised as in his opinion is necessary, but that is not the question now under consideration. Here the assessor made no effort to employ deputy assessors and have the compensation fixed by the board but demanded that the board enter into a contract at an exorbitant price for which the county had not the funds to make the payment. The concluding remarks of the lower court upon this point are as follows:

"The discussion need not be further prolonged. Enough has been said to make it clear that the Legislature has not imposed upon the counties the absolute duty of cruising their timber lands, or of incurring indebtedness for that purpose. The county officers are required only to determine the full cash value of property, including timber lands, as nearly as may be practicable with the means they have. They are not obliged, nor have they the right, to overstep the constitutional limitation for the purpose merely of possibly increasing the efficiency of their service. And the county commissioners have no authority to substitute for the statutory mode of valuing property a method of their own. It follows that, the premises upon which the plaintiff rests its entire contention touching the constitutionality of the contract not being well founded, its argument falls, and the contract must be held to be void. In any other view the constitutional prohibition would in practice prove to be a mere thing of straw. If this con-

tract can be sustained, by parity of reasoning another of like character, for a second cruise, can be made at any time. Of necessity, conditions change from year to year. Some trees are growing, and others are being cut down or otherwise destroyed, and still others are deteriorating in value."

Judge Flinn in the case of *White v. Board of County Commissioners*, *supra*, held that the cruising of timber was not a necessary and ordinary expense under Section 3, Article 8, of the Constitution, and said:

"The second matter for determination is the validity of the warrants amounting to twenty-five hundred dollars issued in payment for the timber estimates of Pelham made on the timber lands of the Coeur d'Alene Indian Reservation.

"It is contended that this is an expense unauthorized by law, and that in the incurring thereof the commissioners have violated section three, article eight of the constitution.

"I am of the opinion that the purchase of such estimates even if they were purchased by the board of county commissioners was the incurring of an indebtedness or liability on the part of the county exceeding in the year 1913 the income and revenue provided for such year, and that the incurring of such expenses was not one of the ordinary and necessary expenses incurred under the general laws of the State of Idaho, and, therefore, that the same was in violation of section three of article eight of the constitution.

"Even if the incurring of said indebtedness were not in violation of said constitutional pro-

vision, I cannot see how it could be considered as an ordinary and necessary expense of the assessor's office, or how the possession of such estimates will obviate the necessity of making a personal investigation either by the assessor or his deputies during succeeding years.

"The warrants involved are therefore held to be invalid and void, and findings may be prepared in accordance with the foregoing opinion."

No appeal was taken from the decision of Judge Flinn because it was evidently clear to the defendants and their attorneys that the cruising of timber lands could not be legally considered a necessary and ordinary expense.

In view of the numerous holdings of our supreme court, the decision of District Judge Flinn just reviewed and the very able opinion of Judge Dietrich in this case we contend that the cruising of timber land is not a necessary and ordinary expense under the general laws of the state within the meaning of the section 3, Article 8 of our constitution.

This disposes of the two legal questions upon which the lower court based its decision. Before considering any of the other questions argued by appellant beginning at page 76 of its brief, or before proceeding further we request the court to read the Brief of Evidence beginning at page 10 herein.

MANDAMUS.

In the prayer of plaintiff's complaint, (Tr. 16-17), two grounds of relief are asked for: (a) That the treasurer be enjoined from paying warrants registered prior to the warrants of the plaintiff and (b) that he by mandatory injunction be required to call and pay all warrants, including the warrants of the plaintiff, in order and not otherwise.

Appellant (pp. 76-77) seeks to answer the suggestion of the District Court that notwithstanding the express direction of the laws of Idaho which require the assessor to assess at actual cash value, no person has ever by mandamus compelled any assessor to cruise timber, and further says: "Without stopping to inquire whether they could be so punished, we submit that mandamus would lie against the commissioners.* * * *"

In the case of *Harris vs. State* 34 S. W. 1017 cited by appellant, the board of assessors had failed to make and certify to the board of examiners a schedule of value of railroad properties as was required by law. If the assessor, under the laws of Idaho, refuse or neglect to have prepared an assessment roll within the time provided, undoubtedly mandamus would compel him to perform his duty. That is an

entirely different condition, however, than requiring the employment of supposedly expert appraisers.

The next case cited by the appellant is State Board of Equalization vs. People, 58 LRA 513. The court held that a county board of equalization may be compelled by mandamus to perform its statutory duties of assessing the capital stock and franchises of corporations. (Syllabus 1).

In this case, however, the appellant seeks by mandatory injunction to compel the treasurer to pay warrants in violation of a positive statute.

Section 1943 of Revised Code provides :

“The board must require their clerk, at the close of every session, to furnish them with a list of all bills and accounts of every nature approved by them at said session, giving the name of each person in whose favor an account or bill of any kind or nature has been allowed, with the amount allowed him and out of what fund the same is to be paid. They must compare their list with the record of their proceedings, and if not found correct, make it so and certify to said list and file it with the county treasurer, and the treasurer must pay no warrant drawn on any fund in the county treasury that does not correspond with the files furnished him by the board.”

It is conceded that no certified list including any bills allowed to M. G. Nease was ever presented to the county treasurer.

Section 2019 of the Idaho Revised Codes provides:

“ * * * * * the removal by the county treasurer or by his consent of such moneys or a part thereof * * * * out of any legal depository of such moneys except for the payment of warrants, legally drawn, * * * * shall constitute a felony, and, on conviction thereof, shall subject the treasurer to imprisonment in the state penitentiary * * * * .”

In the case of *R. R. Puckett v. F. M. White*, Commissioner of the General Land Office, 22 Tex. 560, it is said: “It is made the duty of the commissioner of the general land office, to issue patents upon such surveys only, as have been made in conformity to law. But it is proposed, by this suit, to compel the issuance of a patent upon a survey made confessedly contrary to the literal direction of a plain statute. Laws 6th Leg. 128, ch. Sec. 4. There can be no better settled principle, by the oft repeated decisions of this court, than that a mandamus will not lie to compel a public officer to perform an act which is not a duty clearly prescribed and enjoined by law. A mandamus will not lie to compel the performance of an act contrary to the provisions of a statute which is merely directory. *Horton v. Pace*, 9 Tex. 81; *Commissioner General Land Office v. Smith*, 5 Id. 471;

Cullem v. Latimer, 4 id. 329; Bracken v. Wells, 3 id. 88."

To the same effect is Cook v. Candee, 52 Ala. Rep. 110. State v. Judge, 15 Ala. 740. Rosenthal v. State Board of Canvassers, 19 L. R. A. 157. Turnbull, Relator, v J. Wright Giddings et al. Michigan 19 L. R. A. 853.

The defendant, Oren D. Crockett, as treasurer of Clearwater county, had nothing to do with the records or registration of the warrants under the Nease cruise. He is prohibited, by statute, from paying any warrants, unless a certified list of bills allowed by the board is furnished him. This list was not furnished. It is selfevident that a mandatory injunction would not issue to require the defendant Crockett to pay the warrants under such conditions.

Appellant in its brief (Page 78) in answer to the suggestion made by the lower court that if the cost of this cruise were sustained, it would be necessary to sustain the cost of another cruise this year, or in any future year, says, "It will be a simple matter for the assessing officers to make such corrections in the cruise as such change of condition shall entail, and at a very small expense." How appellant can suggest that it would be a simple matter for assessing offi-

cers to make corrections in the Nease cruise, in view of the testimony of the cruisers showing the hundreds of inaccuracies in the Nease cruise as delivered to the county, we are unable to appreciate. And then, too, the suggestion, "At a very small expense." If it was necessary in 1914 to cruise the entire county, in order to determine the correctness of claims of burned over timber lands, etc., how would the assessor in 1917, either correct the Nease cruise or determine the area of new burns, clearings, etc., unless he sent men all over the same land. We suggest that the Nease cruise in all of its inaccuracies is not subject to correction either at a very small or a very large expense.

GOVERNMENT AND STATE LAND.

This feature of the case is discussed by appellant in its brief beginning at page 79, wherein it calls attention to the contract of defendant county with Nease, which provided "for cruising of all the timbered on patented lands situated in Clearwater county, Idaho." According to the contract Mr. Nease was also to furnish a plat containing topographical sketches showing all openings, burns, marshes, lakes and other topographical features observed by the cruisers. He was to be paid for cruising timber on patented land. He was not to be paid for the acre-

age of burns, marshes, lakes and townsites. Notwithstanding the contract, however, he was able to "get by" and "work in" 144,675.49 acres of unpatented state and government land and land platted as untimbered. See brief of testimony herein.

As a basis for one of the objections made by appellant to the introduction of certain evidence by appellee, the former stated (brief page 24). "The board of county commissioners of Clearwater county was under the law charged with the power of accepting or rejecting the work done by Nease and that, having accepted the same after the performance by Nease, the county is bound by such acceptance, which closes all inquiry into the question of whether the contract had been properly performed or not, in the absence of a showing that the commissioners had been induced to make such acceptance by some fraud or deceit practiced upon them in the matter of acceptance."

The fact that Nease was able to "get by" with and "work in" over 144,000 acres of land for which he charged and received warrants without the knowledge of the county commissioners, seems to us to contain sufficient fraud and deceit in itself to vitiate and void the entire contract. The evidence does not

show that the county commissioners knew anything about this, but on the contrary, conclusively shows that if anyone outside of Nease and his men knew about the "working in" of unpatented lands and marshes, burns and townsites, it was the assessor. The assessor, J. F. Gorman, (the checker), Nease and his men apparently knew, but the board of commissioners did not. When a person working on a contract which will pay him five or six hundred per cent on his investment will deliberately instruct his employes and agents to defraud the other party to the contract, a court of equity certainly should not go very far to lend its extraordinary remedies to his assistance. The old maxim that, "he who comes into equity must come with clean hands" is as true now as ever.

Considerable space is devoted by the appellant to computations and allowances for deductions on a ratio and proportion basis. After trying to excuse the attempt on the part of Nease to "get by" and "work in" certain state and government lands, appellant concedes that warrants for these lands were not valid, but it does not say anything about warrants for untimbered land such as agricultural land, marshes, lakes, clearings, town sites, etc., and computations are made upon the basis of 25,283.72 acres,

whereas it should be made, if at all, on basis of 144,675.49 acres. Yet no credit is given by appellant for the number of acres of land cruised under the contract of February 24, which was mutually abandoned and admitted by all to be invalid. Appellees contend that where a contractor will, through deceit and misrepresentations claim an additional twenty-five per cent. to the amount of his work, the whole work should be condemned.

THE WARRANTS ARE NOT IN THE FORM PROVIDED BY LAW.

Three sections of the revised codes of 1887 (prior to the adoption of the constitution of the State of Idaho) provided:

Section 1781. "Warrants drawn * * * must specify the liability for which they are drawn and when they accrued."

Section 2006. "All warrants must distinctly specify the liability for which they are drawn and when it accrued."

Section 2009. "All warrants issued by the auditor during each year commencing with the first Monday in January must be numbered consecutively, and the number, date and amount of each and the name of the person to whom payable and the purpose for which drawn must be stated thereon, and they must at the time they are issued, be registered by him."

After the adoption of the constitution, Section

2009 of the revised codes of 1887, was amended and appears as Section 2056 of the revised codes of 1907, which section is copied on page 91 of appellant's brief. It will be noticed that all of the requirements of section 2009 of the revised statutes of 1887 are contained in a single sentence, and were brought forward in toto in Section 2056, and commence with the words, "all warrants," in the seventh line of the section on page 91. That sentence comprising the next seven lines contains all of the requirements of Section 2009 of the revised statutes of 1887. Section 2056 of the revised codes, in addition to all of the requirements of the old law, provides that the warrants must be numbered consecutively, "and must show the year against the revenue for which they are to be issued."

Appellant contends that the "Series 1914" on the face of the warrant, which is required by the very first provision of Section 2056, is a compliance with the requirement that the warrant must state the date when the liability accrued, as provided by Section 2006, which section was carried forward in the revised codes of 1907, Section 2053. This is an entirely different section and an added requirement to the provision that the warrants shall be issued in

separate series and of the year against the revenue for which they are to be issued.

The supreme court of Idaho in the case of Feil v. City of Coeur d'Alene, 23 Idaho 50, in discussing the meaning of the word "liability" under section 3 of article 8 of the Constitution, said:

"Bouvier in his Law Dictionary defines the word 'Liability,' as follows: 'Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed. The state of being bound or obliged in law or justice.'" And in support of the foregoing definition, he cites the following authorities: McElfresh v. Kirkendall, 36 Iowa 226; Wood v. Currey, 57 Cal. 209; and Joslin v. New Jersey Car Springs Co., 36 N. J. L. 145. Anderson in his Law Dictionary defines the word 'Liability' as follows: 'The state of being bound or obliged in law or justice to do, pay or make good something; legal responsibility.' The latest edition of the Standard Dictionary defines 'liability' as 'The condition of being responsible for a possible or actual loss, penalty, evil, expense or burden.' The supreme court of California, in Pillar v. Southern Pacific R. Co., 52 Cal. 42, approved the foregoing definition from Bouvier."

Appellant in its brief, page 92, says that because Section 2056 of the revised codes of 1907, in addition to the requirements of the law of 1887, provided that the warrants must show the year against the reve-

nue for which they are issued, that fact alone nullifies the requirement of section 2053, which requires the warrants to distinctly specify the liability for which they are drawn, and when it accrued. The conclusion does not follow, and no attempt is made by the legislature to lay down in this one section all of the requirements for the form of warrant. Both of these sections were in force and effect under the code of 1887. The question was presented to this court in the case of Bingham County v. First National Bank of Ogden, 58 C. C. A. 332, 122, Federal 161, and the court held certain warrants invalid because they did not specify the liability for which they were drawn, or when it accrued, and the court said:

“It is thus seen that the state of Idaho has by statute conferred upon the board of commissioners of the county the power to, among other things, examine, settle, and allow all accounts legally chargeable against the county, and order warrants to be drawn on the county treasurer therefor, and has expressly declared that all such warrants “must distinctly specify *the liability for which they are drawn, and when it accrued.*” Is any court justified in treating such language as merely directory? We think not. It is well settled that, if the statute under which a municipal corporation is organized and acts prescribes a particular mode in which the property of the corporation shall be disposed of, that mode must be pursued. Dillon on Municipal Corporation (4th Ed.) Secs. 463, 578 and 563. The state of Idaho, as has been seen, authorized

the board of commissioners of the defendant county to allow only legal claims against it, within which claims barred by its statute of limitations would not come. *Carroll v. Siebenthaler*, 37 Cal. 193. And it has been held that, even though the governing board of a county should allow illegal claims, it is the duty of the auditor to refuse to draw warrants therefor, and, if warrants are drawn, *it is the duty of the treasurer to refuse to pay them*. *Linden v. Case*, 46 Cal. 171; *Merriam v. Board of Supervisors of Yuba County (Cal.)* 14 Pac. 137; *Trinity County v. McCammon*, 25 Cal. 121.

“The present action being based solely upon the alleged warrants, and as they omit matter made essential by the statute of the state under which they purported to have been issued, they must be adjudged invalid. Being void, they were not the subject of ratification, and were unaffected by the resolution of the board of commissioners of the county embodied in the ninth finding of the court below. *Dillon on Municipal Corporation* (4th Ed.) Sec. 465.

The foregoing decision was approved in the case of *McNutt v. Lemhi County, et. al.*, Idaho, February 19, 1916, 84 Pac. 1054.

And the court said:

* * * * “It is clear that there can be no ratification by a county of an act done in direct violation of the Constitution. The Constitution requires, as a condition precedent to incurring such a liability as the one sued on, that the question should be first submitted to a vote of the people of the county and receive “the assent of two-thirds of the qualified electors thereof, vot-

ing at an election held for that purpose." The purpose of the constitution is to require the specific question submitted to the electors unaccompanied and unencumbered with any other subject or question. The warrants sued on were not issued in conformity with the requirements of section 2006, Rev. St., 1887, which provides that "All warrants must distinctly specify the liability for which they are drawn, and when it accrued." This statute was held mandatory by the U. S. Circuit Court of Appeals in *Bingham County v. First National Bank of Ogden* 58 C. C. A. 332, 122 Fed. 16. See also *Raymond v. People* (Colo.) App. 30 Pac. 504."

THE ALLOWANCE OF THE BILLS.

Let us consider for a moment the statements made by appellant in its brief, page 96, together with the long list of cases cited thereunder. Appellant says:

"If the board had authority to make the contract with Nease, it had power, and it was its duty, to determine whether the contract had been performed to its satisfaction, and its determination of that question and allowance of the claim cannot be avoided except for fraud, mistake or failure of consideration."

To appellees it seems rather academic to argue this proposition at all; for an argument of the question assumes the correctness of the major premise, towit, "the board had authority to make the contract with Nease * * * * ." The two major propositions

upon which the lower court based its decision go directly to the power of the board to enter into the contract. And while the proposition stated by appellant is in the main correct, nevertheless, a large number of cases cited do not sustain it. However they do sustain many of the points argued on behalf of appellees; and so, in reviewing some of the cases cited by appellant, we do so only to point out these rules of law laid down in them and for no other purpose.

The first case, *Shirk vs. Pulaski county, Fed. cases 12794*, does not sustain the proposition of appellant, but the syllabus, on the contrary sustains the contention of appellees, viz.:

“The acts of the county authorities, in auditing the claim and issuing the warrants, is not conclusive, as a judicial determination, upon the parties.”

Also the next case, *Board of Commissioners vs. Sherwood, 64 Fed. 107*, is a case not supporting the proposition of appellant. The court says:

“It is quite generally agreed that county warrants are not negotiable instruments, in such sense that a transfer of the same for value cuts off equities of defense which exists as between the original parties. They are orders directing the payment of a claim which has passed the scrutiny of the auditing board. They are therefore *prima facie* evidence of an indebtedness, like a written admission of a debt made by

a private individual; but they are by no means conclusive means of an indebtedness, and do not bar a reinvestigation of the merits of the claim on which the warrant is founded when a suit is brought on the warrant."

The next case viz. Thompson vs. Searcy County is authority for the proposition that a county is not entitled to a reduction of the contract price merely because the building when completed was not worth the amount charged. The case is also authority for the following proposition; Syllabus 4:

"With respect to the interpretation of state statutes regulating the making of contracts by counties, the decisions of the state courts are binding upon the courts of the United States."

The next case cited by the appellant only approves the holding in the first case, and so on with the balance of the cases in that paragraph. It is useless to quote further, because, as previously stated, there could not be much controversy on appellant's proposition in the abstract. The difficulty with it is, however, that the facts in the present case are contrary to two of the premises, and it must be conceded that if the board did not have authority or power to enter into the contract, or, if fraud, mistake, failure of consideration or deceit entered into the securing of warrants, then and under those conditions the decision of the lower court must be affirmed.

Let us investigate the next list of cases appearing upon page 97 of appellant's brief. In the first case *County of Cook vs. Ryan*, 51 Ill. App. 190, the court says:

"Can any man truthfully say that if the entire facts had been known, the certificate of W. J. McGarigle and H. S. Barnell, and the affidavit of Walker, would have been deemed sufficient? Would not, upon the presentation of the facts this record discloses, a most thorough investigation as to the delivery, weight, quality, price and necessity for and of each article have been had? Finally, is it the law that an allowance of bills by a municipal body obtained under such circumstances, is binding upon it?

"Fraud vitiates all acts. The county of Cook acts entirely through agents. If they conspire against it, to deceive it, it is not bound by what they, for their profit, may by such deception for their gain, induce it to do. No allowance of any account to Francis R. Murphy was ever knowingly made. No warrant to him ever ordered."

Can any person truthfully say that if the board of county commissioners of Clearwater county had actually known the facts as disclosed by the records in this case (and really we have only touched the surface) that these warrants would have been drawn and the bills of Mr. Nease allowed? Can any one say that if a brief statement of all of the acts and proceedings of the board had been published as pro-

vided by section 1917 of the Idaho Revised Codes and referred to at page 94 in appellant's brief, in which the slightest allusion had been made to the fact that Nease was including in his bills a charge for cruising unpatented state and government lands and also including a charge for cruising marshes, burns and townsites, that either an action would not have been started at once to investigate the Nease contract, or that an appeal would not have been taken within the time provided by law under the section of the Revised Codes referred to at page 95 of appellant's brief? We certainly agree with the holdings of the case of Cook county v. Ryan, and believe that fraud and deceit vitiate all acts.

Can it be said that if the notation on the field report of Archie Young: "These two forties were actually cruised, balance done in camp," had been brought to the attention of the county commissioners that they would have allowed Mr. Nease's claim for that work?

The county acts entirely through its agents, and even though the county assessor and the county checker and Mr. Nease, all had knowledge of the inclusion of state and government land and untimbered land to the extent of 144,000 acres in the claims against the county, and these facts were not made-

known to the board of county commissioners, thereafter upon discovery of such fraudulent acts the county would be at liberty at any time to avoid the entire contract. The evidence is clear that the county commissioners never at any time knew that Mr. Nease was charging for the cruising of burns, lakes marshes, openings and towns. These commissioners acted like many other boards. They had an assessor who had years of business experience. He had before been deputy assessor, he had been probate judge, he had years of experience in banking circles and was of course familiar with bookkeeping and accounts. The county commissioners certainly were not expert accountants and in great measure relied upon the statements of the assessor that the Nease cruise was all right. All of these commissioners testified that they might look over the work a little, and upon inquiry of the assessor, and information from him that it was checking out all right, they allowed the bill.

Where can appellant find a case giving authority for the proposition that a county would be estopped from repudiating the entire contract under such circumstance. The cases cited by appellant are favorable to the contention of appellees.

Propositions D and E of appellant's brief, from pages 93 to 109, were probably given prominence because the lower court found that the commissioners did not enter into the contract from corrupt motives. The court says (Tr. 174).

"Though the view may be entertained that the commissioners acted improvidently and were wanting in vigilance and care, I am convinced that they were not actuated by corrupt motives. The inculpatory circumstances surrounding the letting of the contract may all reasonably be referred to their inexperience in public affairs and their real, even though somewhat grotesque, fear of the so-called timber companies, and likewise their want of vigilance in requiring strict conformance and their compliance in allowing the claim as presented may very well be explained in their confidence in and reliance upon the assessor's approval. * * * * *

Section 2258 of McQuillin on Municipal Corporations, is cited by appellant at page 98 of its brief. The same author at section 2259, however, says:

"Any defense which can be set up in an action on any contract, can be urged in an action against a municipality on its warrants, without regard to whether plaintiff is a bona fide holder for value. * * * If warrants are construed to constitute indebtedness, and the debt limit of the municipality has been exceeded at the time of the issuance of the warrants, the municipality can not estop itself, by its conduct or otherwise, to deny its liability when sued upon such warrants."

The author cites *Elly Valve Co. vs. Town of Crown Point, Ind.*, 3 L. R. A. New Series, 684. Syllabus 1 is as follows:

“Warrants void because issued by a town in violation of the constitutional restriction of a debt limit are not subject to ratification.”

“THE COURT WILL SEARCH THE RECORD IN VAIN TO FIND
ANY EVIDENCE OF FRAUD OR ARTIFICE PRACTICED
ON THE BOARD.”

(Appellants brief p. 99).

Mr. Smith, in his work on the law of frauds says that it seems to be a hopeless task to frame a general definition sufficiently specific upon the one hand and comprehensive upon the other to reach the requirements of a definition. It seems that there are two necessary constituents in fraud—one, the intention to defraud; and, second, actual loss. In paragraph 126 he says:

“A common means of perpetrating fraud is by means of some artifice or deception by which the person defrauded is prevented from exercising the ordinary caution * * * which would result in the discovery of the falsity of the representation.”

We would slightly change the statement of appellant and say that if the court will search the record it will find many badges of fraud, chicanery and deceit. When the investigating commit-

tee went to Portland, they were piloted around by Mr. Nease, taken down to Astoria, Oregon, and back again by Mr. Nease, and in fact the record seems to indicate that Mr. Nease was present at all times while they were investigating him. Nothing particularly fraudulent is shown by the record here, only it shows the way many junkets are conducted--in the interests of the party to be investigated. The probate judge resigned from a position with few duties, and accepted one as assessor which would consume all of his time and at no increase in salary; the regular assessor resigned and accepted appointment as a deputy assessor. True there is nothing fraudulent about these acts, only they look strange. Immediately after the probate judge had been appointed assessor, he demanded that the county commissioners enter into a contract to cruise timber. He would give no time for investigation. He had Mr. Nease present at the meeting and would not hear from anyone else--he was the one who made the suggestion to the commissioners that anyone who had worked for a timber company would not be qualified to work for Clearwater county. Perhaps there was nothing fraudulent here but the act seems slightly hasty. The unwarranted change in the assessed value of the property of John Lewis from \$3,000.00 to \$10,000.00 just

after he started the suit to enjoin the cruise is a peculiar circumstance. After the service of the papers in the John Lewis suit specifically calling to the attention of the assessor and commissioners, that they were proceeding contrary to law and in violation of the state constitution, they held another meeting within two days and without call for bids, without plans or specifications, without knowing what kind of a cruise they were going to get, let a contract to cruise all of the timber land in the entire county.

The fact that M. G. Nease quickly made settlement with the timber companies and got them to withdraw the Lewis suit, (at the proper time); the constant communication between Mr. Nease and the managers and representatives of the timber companies during the time he was making the cruise; the changing of the methods of cruising from double running, (which was prevalent prior to the settlement of the Lewis suit), to single running and hastily getting over the ground with no checker on behalf of Nease to investigate the work of his men; the positive instructions of Mr. Nease to change from double running to single running; the positive instructions of Mr. Nease to cruise unpatented state and government lands, that he could "work it in;" the inclusion in the bill of

144,000 acres of unpatented land and untimbered land contrary to the terms of the contract; the mysterious keeping of the books of the checker, Gorman, for the county, so that no one had access to them except Gorman and the assessor; the fact that the assessor had ten books of reports handed to him by the county checker, Gorman, and that no demand was ever made upon Mr. Nease to ever recruise or recheck any portion of his work, notwithstanding the fact that there were hundreds of flagrant discrepancies; the ultimate and complete disappearance of these books of the county checker; the continued reporting to the county commissioners by the assessor that Mr. Nease's work was checking out all right; the fraudulent and deceitful methods employed in the office of Mr. Nease in making reports and "write-ups" entirely from the imagination of the office clerk doing the work; the "jibing" of ridges, ravines, rivers, burns, clearings, etc., by the office force; the arbitrary raising and lowering of the entire work of a cruiser without a recruise; the secret calling into convention of the representatives of all of the large timber companies for the purpose of comparing their office estimate with that of the Nease cruise before it was submitted to the county; the request that a manager of one of the timber companies call at the

Empire National Bank and assure it of the validity of the cruising warrants and explain to the president of the bank the history and dismissal of the Lewis suit; the keeping of the John Lewis suit alive and to all appearances an actual contest, and also keeping alive an appeal from the action of the board of county commissioners in entering into the contract long after the timber companies, in whose interest the suit was brought, had agreed at the Spokane conference with Mr. Nease that it would be dismissed.

All these facts form a cumulative record of fraud and deceit which is not wholly in keeping with appellant's statement quoted.

We admit that it is difficult to define fraud, but we contend that with a record so full of deceit, misrepresentation, falsifying, double-dealing and collusion, after a complete reading of the transcript one would be unable to read any passage without seeing where the particular work of Nease had something to do in the aid of the fraud and deception practiced in the securing of the warrants from Clearwater county, and we concur in the holding of the court in *Cook county v. Ryan*, cited by appellant, wherein it says: "Fraud vitiates all acts. If certain officials conspire against the county, it is

not bound by what they, for their profits, may by such deception induce it to do.

"SOMETIMES A STATEMENT OF FACTS ANNOUNCES THE LAW."

The Supreme Court of the State of Washington in the case of Bier v. James B. Clements, E. C. Houston and F. L. Bash, County Commissioners of Benton County, et al., filed September 18, 1917, had under consideration a case similar to the one at bar. In that case two of the commissioners "went to Pasco and consulted with E. A. Davis, an attorney of that city, who at their request accompanied the commissioners to Spokane for a conference with Messrs. Zent and Powell * * * The result of the Spokane conference was a determination to issue county bonds and out of the proceeds erect a court house. Up to this time no action had been taken by the board of county commissioners relative to the construction of a court house, nor had any discussion taken place at any of their meetings suggesting the issuance of bonds in any form for that purpose; no plans had been adopted looking to the erection of a courthouse; in fact so far as the board of commissioners was concerned the idea of erecting a court house was yet unborn.

"On Sunday, December 3rd, Mr. Zent, of counsel employed by Clements and McNeil, appeared at Prosser with the bonds issued in serial number 1 to 250 inclusive, aggregating \$125,000. The bonds were dated December 4th, and contained an unsigned certificate of registration. * * * *

"At the trial witnesses on behalf of appellant representing reputable bond buyers and the State Board of Finance testified that, based upon market conditions and actual sales of like municipal securities at the time, these bonds, if advertised and offered for sale on the open market would have brought par at $4\frac{1}{4}$ or $4\frac{1}{2}$ and if sold at $5\frac{1}{2}$ would have brought a premium of at least eleven points. Respondents offered proof to the effect that the sale was made at a fair price, but the evidence of the witnesses so testifying is not reliable not being based upon knowledge of market conditions for like securities. * * * *

"The motive actuating commissioners Clements and McNeil to take the action they did while not very material or relevant is plainly shown. The term of office of both would have expired the following January; each had been a candidate at the preceding election and each had been defeated."

Courts are sometimes reluctant to base a decis-

ion upon the ground of fraud where county officials have acted in their official capacity. In the case at bar the lower court took occasion to comment upon the actions of the various county officials, but based its decision upon other grounds. In the Washington case just cited, the court, while perhaps having technical grounds, based its decision entirely upon the badges of fraud appearing in the record. Perhaps no one act would in itself be sufficient fraud to void the issue, yet, taken as a whole, the court had no hesitancy in declaring the proposed bond issue illegal, and said:

“It does not seem necessary to dwell longer upon the facts before us. Sometimes a statement of the facts announces the law—this is such a case. A board of county commissioners is a legislative and deliberative body and as such, acting within its scope and discretion, its action is final. In the exercise of its discretion such a board must, however, act in good faith and without fraud in law or in fact to those whom it serves. This much the law demands and when county commissioners go beyond the limits of good faith and palpably abuse the discretion vested in them, the law will interfere for the protection of the tax payer. This record is reeking with bad faith * * * The prosecuting attorney is, by law, the legal adviser of the board. In this case he is passed over, and outside legal advice is sought. The record is silent as to the reason but in the light of other facts it may be surmised. By jugglery and secretive procedure a bond is-

sue is to be foisted upon the taxpayers of Benton County without the previous knowledge of any save the first active participants; a court house is to be built without prior determination of plans, estimates of cost, procurement of site, or deliberation or discussion of the matter on the part of the board, or indulgence in any of those matters that usually precede an undertaking of this character.

"No citation of authorities is necessary to sustain the conclusion we have reached that the action of these two commissioners was so arbitrary, fraudulent and in such bad faith as to merit the censure of the law and grant appellant the relief prayed for. Our reasoning is sustained in the following of our own cases:

Krieschal v. County Commissioners, 12 Wash. 428.

Times Pub. Co. v. Everett, 9 Wash. 518.

State ex rel Yeargin v. Maschke, 90 Wash. 249."

In the case at bar no plans or specifications were prepared, the advice of the county attorney was passed over; urgent demands of the assessor to accept the bid of Mr. Nease without investigating the bids of other parties; the failure to check the Nease cruise and many of the other facts ^{detained} ~~inaugurated~~ herein are as strong if not stronger badges of fraud than appeared in the Washington case.

At page 99, appellant relies on a new argument, and indicates that even though fraud and artifice

were practiced upon the board and thereby it was induced to allow bills which it otherwise would not have allowed, and even though the court should hold that the acceptance of the work by the board did not preclude inquiry into the character of the work, that nevertheless the terms of the contract prevent the county from investigating the deceitful and fraudulent practices of M. G. Nease and his agents in the acquiring of the warrants. And appellant says that the county had a ten thousand dollar bond. What chance has it to recover forty-five thousand dollars under a ten thousand dollar bond? If fraud and deceit were practiced in the securing of the warrants; or, if the contract was made in contravention of a direct statute; or, in contravention of the provisions of the constitution, then must we go to a void contract for relief? Certainly not.

At page 101 of appellant's brief, suggestion is made that if fraud has entered into a large part of the contract and a large part of the work is defective, then certainly there must be some little portion of the work performed by Nease that is correct. Just where this correct portion is has never been pointed out. In every instance wherever a comparison was made with the report turned into the county, either by the Wherry and Swanson recruits or by Nease's men them-

selves, or by a comparison with the Nease reports and the estimate of the timber companies, it was conclusively shown that the work was inaccurate and unreliable.

On the same page and in the second paragraph, appellant makes the statement as a basis for argument, "if the county commissioners had authority to make the contract." Practically all of appellant's brief from page 79, is predicated upon the assumed premise that the board had authority to make the contract. The lack of such authority is one of our defenses and it was ably sustained by the lower court.

Appellant says, page 102, "cruising is not an exact science in any event." This we readily admit and the record amply proves that the cruising performed by Nease was nothing more or less than a wild guess and even the guesses as turned into Nease are jibed, doctored, falsified and distorted before being given to the county. Appellant admits that the method applied by Nease was not so accurate as others, but states that the expense of the other method is generally prohibitive. If according to appellant's original argument that a cruise was indispensable to the assessor, in making the assessment, then he undoubtedly would be required to have an accurate and

not a counterfeit cruise made. Could anyone say that the assessor had complied with the interpretation of the requirements of the law as stated by the appellant by having made the most inaccurate and unreliable form of cruise which has ever been recognized for any purpose? If an accurate cruise—(and the record would indicate that there is no such thing)—is prohibitive on account of the expense, then where does appellant find logic, argument or reason for its contention that any kind of a cruise will do, or if a good cruise is too expensive that an unreliable, inaccurate and erroneous cruise as a basis for faulty, deceitful and “jibed” reports is required by the law, in order that the assessor may not languish in jail for a dereliction of duty?

Attention is called by appellant at page 103 to the animus of Roy Wherry, who checked some of the Nease work. The evidence conclusively shows that Wherry did not know the location of the land he was going to check until he had left Orofino; that he had no reports of Nease in his possession; that he did not know whether he was going to meet a high or low cruise. He was in court, and subjected himself to a rigid examination. The entire array of cruisers whose names appear at pages 105 and 106 of appellant's brief were present in court and facing him, yet

the record is silent and does not show where any one of these men ever made a single attempt to dispute or discredit his testimony. If Roy Wherry found green timber and a fine body of second growth white pine where Nease's cruisers had advised the county that it was burned, and so platted it on their reports returned to the county, and this testimony remained undisputed, we would conclude perhaps that Wherry's testimony was correct; regardless of any animus or bias.

Appellant says at page 103 that the defendant county made no attempt to check the correctness of Nease's cruise except by Wherry and Swanson and that they only cruised 6,448 acres. As admitted by appellant on the preceding page, the cost of making a careful cruise would be absolutely prohibitive. However, the small number of acres recruited by Wherry and Swanson in comparison to the 500,000 acres cruised by Nease is small; nevertheless the inaccuracies of the report and the fraudulent work done in the field and the deception practiced by Nease and his cruisers as disclosed in this comparatively small recruitise, should conclusively show to any fair-minded person that the entire cruise was made up of hasty, inaccurate and fraudulent work. As Colonel Harvey says in the current North American Review:

“We need not further analyze the noisome contents of the cup. These few drops are sufficient to indicate the vileness of the whole.”

At page 110 appellant alludes to the John Lewis suit and it is stated that there is no evidence to show that Nease had anything to do with instituting or delaying the disposition of either of the actions. We would hardly expect either Mr. Nease or any other interested party to make such an admission. The fact remains, however, that Nease and the timber companies agreed that the suit should be dismissed early in the summer. Why was it not dismissed? Mr. Harlan stated and testified to the fact that if this suit had not been kept on the docket that he or other taxpayers would have instituted a similar suit. Appellant admits at the bottom of page 110 that Lewis was nothing more or less than a pawn for the Clearwater Timber Company. Yet this same Clearwater Timber Company, by the way, was in conference with Mr. Nease during the summer and had their estimates at Portland and checked over the Nease cruise before it was returned to the county. While the evidence may not be direct that these suits were kept pending to blind the vision of the taxpayer as to the status of the conditions and arrangement between Nease and the timber companies, the fact remains that they had such an effect, and answers

the suggestion made by the lower court that an appeal from the action of the board of county commissioners could have been taken. It is well known that if one taxpayer starts a suit in the interest of all taxpayers, no other individual is going to hastily run in and start a similar suit.

Under subdivision B of appellant's brief at page 113 is cited McQuillin on Municipal Corporations, section 2251. This section provides:

"A person taking a warrant is bound to know the law relating thereto. He is not a favored creditor * * *. However, if the warrant of a municipality is invalid but the original indebtedness is valid, the holder of the warrants may recover on the original indebtedness. But if one purchases void warrants, he cannot recover the amount paid from the city unless it is shown the latter properly received the money and used it for legitimate purposes."

The following language in Abbott on Municipal Corporations 528, viz:

"Provisions that a warrant shall show upon its face the purpose for which it was drawn are usually considered mandatory, and in the absence of such recital no recovery can be had even by a bona fide purchaser."

was quoted with approval in the case of Borough of Secaucus vs. Kiesewetter, N. J., 84 Atl. 622.

Appellant at page 114 says:

“The county having received and retained the fruits of the contract, cannot shield itself by a plea of irregularity.”

It would seem from an examination of the evidence that the “fruit,” by the time it had reached Clearwater county had been transported by so many unclean hands that it had entirely decayed from skin to core, with deceit, misrepresentation, chicanery and fraud.

Argument along the same line is carried on at page 115, but predicated upon the assumption that “if the county commissioners had authority to make the contract;” and under this heading suggestion is made that before the completed cruise was available it brought about three million dollars of increased value on the tax rolls. If the cruise was not available, how did it bring about this result? Perhaps by the same method that the John Lewis land was increased in valuation for assessment purposes from three thousand dollars to ten thousand dollars. If an assessor could arbitrarily do this in three minutes without a cruise, on a very small tract of land, what could he do in the entire county?

Statement is made that the county used the cruise before the state board of equalization with its approval. It appears that one of these books was

taken to the board for exhibition purposes, but it developed at that meeting that while Clearwater county was assessing its timber land on the basis of a cruise most of the other land in the state was being assessed by a different method.

Section 5, Article 7 of the State Constitution provides.

“All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal:”

It was not intended that one county should cruise its timber while another county should use a blanket assessment. It was not intended that two or three county commissioners or assessors should prescribe a method of assessment of timber land different from the method adopted by the balance of the counties in the state.

Appellant at page 119 under subdivision B argues that mandamus will lie to compel the county treasurer to pay the warrants even though they are not in proper form and no certified list of the claims allowed had been filed with him, as required by statute. It is conceded that the list was not filed, and

that section 1943 of the Revised Codes requires that such lists be filed, and that the treasurer must pay no warrants unless it is so filed with him. This same statutory inhibition was referred to by this court in the case of Bingham County vs. First National Bank of Ogden, Utah, *supra*. In addition to the cases heretofore cited that mandamus will not lie to compel a county officer to perform an act prohibited by a positive statute, we call the court's attention to two sections of Article 7 of the State Constitution, as follows:

“Sec. 13. No money shall be drawn from the treasury but in pursuance of appropriations made by law.

“Sec. 14. No money shall be drawn from the county treasury, except upon the warrants of a duly authorized officer in such manner and form as shall be prescribed by the legislature.”

The only reason advanced by appellant why mandamus should lie in this instance, even though prohibited by law and by the state constitution, is found at page 120, wherein it says “it appears that claims of other parties were allowed and warrants issued therefor, for which no certified list was given to the county treasurer, * * * .” Just because the county treasurer in some instances had violated the provisions of the statute it cannot be used as author-

ity for mandamus against him in a case reeking with bad faith, fraud and deceit. If no other defense were made by the county treasurer, it would seem that this one would be sufficient reason for a dismissal of the action as to him.

Certainly the mandates of the constitution and the laws of the state are not to be lightly set aside and avoided, and the taxpayers of the county must rely upon the courts to safeguard their interests from contracts made in violation of the laws enacted for their protection.

For the reasons herein set forth, we contend that the decision of the lower court should be affirmed.

Respectfully submitted,

FRED E. BUTLER,

JOHN R. BECKER.

Received copy of the foregoing brief September 29th, 1917.

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Attorneys for Appellant.

APPENDIX.

At the time of the adoption of the constitution of the State of Idaho the convention had in mind only such expenses as were necessarily incurred in carrying on the county government, such as salaries of officials and other like expenses, and the following appears at page 584 et seq., Vol. 1 Idaho Constitutional Convention:

SECTION 3.

SECRETARY reads Section 3, and it is moved and seconded that the same be adopted.

Mr. HARRIS. I move that it be stricken out.

Mr. HAMPTON. I offer an amendment to strike the whole section out, as the county would be prevented from paying the regular current expenses in some cases, if it happened that the amount which was levied did not amount to as much as was necessary to run the county government. For instance we might have heavy county expenses that would run up considerably beyond the amount that was allowed by the board who made the levy, and in that case there would be no means of paying the debt—it would be null and void—all the expenses that were necessarily incurred in the carrying on of the county government would be null and void. It seems to me that is entirely wrong. * * * * *

* * * Mr. CLAGGETT. Mr. Chairman, I offer the following amendment to Section 3.

SECRETARY reads: Add at the end of Section 3: Provided, That this section shall not be construed to apply to any ordinary indebtedness created under the general laws of the state.

Mr. CLAGGETT. I move the adoption of the amendment. (Motion seconded).

Mr. AILSHIE. I would like to hear that read.

SECRETARY reads: Add at the end of Section 3 as follows: "Provided this section shall not be construed to apply to any ordinary indebtedness created under the general laws of the state."

Mr. CLAGGETT. I simply call the attention of the convention to the fact that the way it reads now it would prohibit the issuance of county scrip to pay the ordinary indebtedness absolutely imposed upon the county as provided by law, in case there should be any heavy expenses, as suggested by Mr. Hampton, exceeding the current revenues of that year; and that is intended to apply to special indebtedness, I should judge.

Mr. AILSHIE. That nullifies the section as it stands now. What absolutely nullifies the section, destroys the whole life of it. If they can go on and issue scrip, that is incurring indebtedness. * * * * *

* * * * * Mr. CLAGGETT. I would like to ask the gentleman from Ada one question. I offered this proviso to call the attention of the convention to this matter. We don't want to go over this too fast. For instance, the general laws of the state will provide that the witness fees are so much, the mileage fees are so much, all the expenses of the county government are fixed by law. Those expenses are paid annually by the issuance of county scrip, or paid as they arise by the issuance of county scrip. We all know that in the practical administration of county government, that there sometimes will be extraordinary expenses. I mean extraordinary expenses in

the ordinary administration of affairs. I am not speaking now of special indebtedness at all, but the ordinary general indebtedness which is incurred in the way of administration of county affairs. Now, of you pass that section in the way it is you will absolutely require that when a witness wants to get his fees, after he has attended upon the court, before he can do it the county commissioners have got to stop and submit at a special election to the whole vote of the people as to whether they will pay them or not, and that is the object of the proviso; it is to limit the section to such indebtedness as does not arise under the ordinary administration of the county. I will call for the reading of the amendment again, Mr. Chairman, so that we may understand it.

SECRETARY reads: Add at the end of Section 3 as follows: "Provided that this section shall not be construed to apply to any ordinary indebtedness created under the general laws of the state."

Mr. REID. Will the gentleman accept this amendment: "Provided it shall not apply to the usual and necessary expenses."

Mr. CLAGGETT. Certainly, I will accept the amendment.

Mr. BATTEN. I am opposed to the amendment or substitute offered by the gentleman from Shoshone. If we are going to restrict any state or municipal indebtedness, let's restrict it. Let's not do as did Rip Van Winkle when he made a resolution not to drink anything—keep on drinking and say each drink did not count. Now we are here in this article dealing with municipal and state indebtedness, dealing with it with a view to restrict it within certain bounds. Now the object of this proviso would eat the

whole life out of the matter, deprive it of its very meaning, so that I am for that reason opposed to it. There are ample provisions made for meeting every objection which is urged against it, and that is if two-thirds of the qualified electors shall deem the emergency such as to require an additional levy, they can order an election or vote for that purpose. Now why restrict that indebtedness and then in the next line say we don't mean it? That is the effect of the whole matter. It seems that there is unanimity of sentiment in both committees, the committee on Municipal Corporations have a section identical with this, and in preparing this draft I took the section from that of California in the main, and I also found the same sections in almost all the states, and I think we should go a little slow about stripping from this provision the very meaning we have put in it.

Mr. REID. I think the objection raised by the gentleman from Alturas does not apply, because if you continue down in the fifth line you will see it reads. "Unless, before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund." It seems that the section was intended to apply to the incurring of a permanent indebtedness, and it seems as though the committee did not mean to limit it to current expenses, because if so, the committee would not have put in the balance of those lines, in the fifth, sixth and seventh lines. Now as to the incurring of any permanent indebtedness or extraordinary indebtedness out of the usual course, I am in favor of limiting that in the way in which we usually limit counties. A man does not know as suggested by the gentleman from Shoshone, when he gets county scrip for attending as a juror or a witness—he does not know whether it is in the county treasury or not. The effect of it would

be to hold county scrip down to allow speculators to get hold of it.

* * * * Mr. HAMPTON. I desire to offer a substitute for the gentleman of Shoshone's amendment, Insert after the word "purpose" in the third line, the words "except for necessary court expenses." This is a thing that must be provided for, it seems to me.

Mr. CLAGGETT. "Ordinary and necessary" placed at the close, brings out the meaning of expenses, the effect.

Mr. PRITCHARD. It seems to me that it will not. (Reading): "Any indebtedness or liability incurred contrary to this provision shall be void," it seems to me to provide that if any indebtedness above what is provided for should occur, court expenses or anything of that kind, it is simply void by this provision, and an election or anything else would not make it legal. It is simply void unless an election is going to make it legal.

SECRETARY reads: Insert in the third line the words "except for necessary court expenses."

Mr. MORGAN. I think the gentleman from Cassia's substitute is entirely covered by the amendment of the gentleman from Shoshone; it would include the ordinary court expenses. I think the entire matter is covered by the gentleman from Shoshone and I hope it will prevail. (Cries of question).

Mr. PEFLEY. It occurs to me if that motion should prevail it would cut cities off. Now we are liable to fall short in our ordinary levy in this city. We have streams running adjacent through the city that in time of high water, and ditches all the time,

that are liable as I said to break away and run down through the city, and if we had to wait to hold an election and get two-thirds of the voters to ratify another levy, the whole city might be ruined before it could be abated, and I would not like to see anything of that kind occur. I think it should apply to cities and counties alike and all corporations, that they should be allowed in contingencies to abate them immediately without waiting for an election to be ratified by two-thirds.

Mr. HOWE. I wish to offer an amendment to the section.

SECRETARY reads: To amend Section 3, line 3, by striking out the words "income and revenue provided for it" and insert "usual and necessary expenses."

Mr. HOWE. I think it should properly be taken and substituted for the amendment of the gentlemen from Shoshone. I don't understand, Mr. Chairman, that phrase "income and revenue." Now before the commissioners fix the amount of the levy that they will put upon the property for such amount of indebtedness, they will first ascertain what the liabilities are and what the requirements are, and they will make such levy as to cover the whole—that is of the indebtedness at that time; and they may make a levy to cover the indebtedness, not to cover income and revenue. They raised this income and revenue to meet the expenses, and all we have to guard against the income.

***** SECRETARY reads: "Add at the end of Section 3 as follows: 'Provided that this section shall not be construed to apply to any ordinary indebtedness created under the general laws of the state.'"

Mr. CLAGGETT. And I except the amount of any general or ordinary expenses.

The CHAIR. The gentleman from Shoshone offered an amendment to which Mr. Howe offered a substitute. The question is now upon the substitute offered by the gentleman from Nez Perce.

Mr. GRAY. Let's see what that is.

SECRETARY reads: In Section 3, line 3, strike out the words "income and revenue provided for it" and insert "usual and necessary expenses." (Vote).

The CHAIR. It is lost. The question now recurs upon the amendment of the gentleman from Shoshone, Mr. Claggett; are you ready for the question? (Cries of "Question").

Mr. MORGAN. I move the adoption of the section as amended. (Seconded).

Mr. HARRIS. I move an amendment to the section.

SECRETARY reads: Amend Section 3 by striking out the words "two-thirds" in line 4, and insert the words "a majority."

Mr. HEYBURN. I second the amendment.

The CHAIR. The question is now upon the amendment offered by Mr. Harris. (Rising vote shows 15 ayes, 26 nays). The amendment is lost. The question now recurs upon the motion of the gentleman from Bingham that the section be adopted. (Carried).

INDEX OF EXHIBITS ANNEXED TO ANSWER OF APPELLEES.

NO.	TITLE OF EXHIBIT	Page in Transcript
1	Notice of Call for Special Session of Board for purpose of considering assessment of timber; entering a contract therefor and hear petition for special election to vote bonds	44-5
2	Proposal of M. G. Nease of Feb. 20, 1914, for cruising timber	45-47
3	Proposal of Ralph B. Hunt of Feb. 24, 1914, for estimating timber for valuation for taxation	47-50
4	Contract between Clearwater County and R. L. Rankin for estimating timber that will run 1,000,000 feet B. M. Per Sec.	51-55
5	Contract of Feb. 24, 1914, Bet. Bd. of Co. Comm'srs. and M. G. Nease for cruising timber	56-61
6	Copy of Minutes of meeting of Board of Comm'rs. of Feb. 24, 1914, accepting the proposal of M. G. N. and authorizing contract	62-63
7	Copy of Order to Show Cause, Affidavit of Service and Affidavits consisting of 22 pages	63-91
8	Consent to a cancellation of Contract of Feb. 24, 1914, by M. G. Nease	91
9	Recommendation and request by P. H. Blake as County Assessor to the Board for a careful cruise, dated Apr. 15, 1914	92-93

10	Proposal of M. G. Nease dated April 15, 1914, for the examination of the patented lands subject to taxation in Clearwater county	93-95
11	Contract bet. Clearwater County and M. G. Nease, dated Apr. 15, 1914	95-101
12	Opinion of county attorney as to legality of contract for cruising timber lands in the county	101-03
13	Bond for faithful performance of contract of M. G. Nease	103-05
14	Dismissal of Action in case of John Lewis vs. Zelenka et al.	106
15	NOTICE OF APPEAL In the matter of acceptance April 15, 1914, by the Board of Commissioners of Clearwater County, State of Idaho of the proposal of M. G. Nease to the said Board dated April 15, 1914	107-09
16	Cruisers' instructions and agreement	110-15
17	Annual Financial Statement of the County Auditor of Clearwater County, Idaho, for the fiscal year ending April 10, 1915	116-50

(Appellant has prepared and had printed an index of the other exhibits offered in evidence)

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DEXTER HORTON TRUST &
SAVINGS BANK,

Appellant,

vs.

THE COUNTY OF CLEARWA-
TER OF THE STATE OF
IDAHO, and OREN D.
CROCKETT, as Treasurer of
Said County,

Appellees.

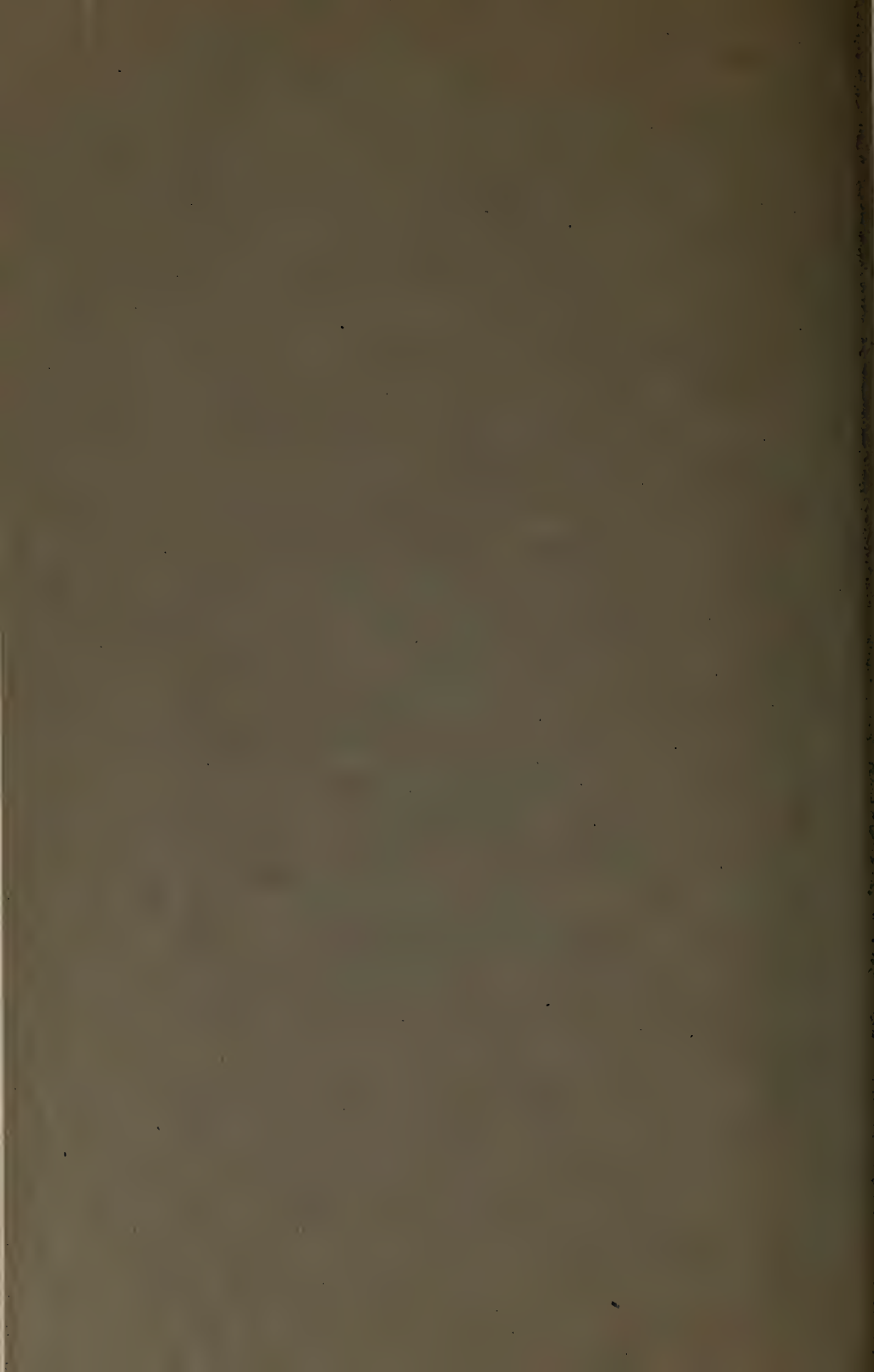
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UPON APPEAL FROM THE UNITED STATES
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Appallant's Reply Brief

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CORRECTION OF THE RECORD.

We desire to call the court's attention to an error in printing. On page 273 of the record there is a reference to prior pages of the record. These prior pages are referred to as pages 41, 42 and 43.

These are the pages of the typewritten transcript and the printer neglected to change the figures to indicate the proper pages of the printed record. The reference should be to pages 263, 264 and 265.

I.

We shall first notice appellees' argument in support of the claim that the law prohibits the employment of private parties to do the work which was performed by Nease.

(a) The proposition advanced by the appellees is that the cruising must be done, if at all, by the assessor. It is sought to sustain this proposition on the principle that the county commissioners have no power to hire private parties to perform the official duties which the law has specifically imposed upon an elective officer. And the argument of the appellees is that, if cruising of timber lands is necessary, it is therefore a part of the official duties imposed by law upon the assessor.

This argument wholly ignores the distinction between the assessing of property and furnishing to the assessor information which enables him to do the assessing. That the mere furnishing to the county of information to enable the assessor and the board of equalization properly to assess lands

is not either listing or valuing the lands is perfectly clear. If the assessor, having no knowledge as to the amount of timber upon a section of land, and desiring to procure such knowledge, applies to a person who has that knowledge and procures it, can it be said that the person who furnishes such information to the assessor thereby usurps the functions of the assessor? What Nease did was to procure information of the amount of timber upon lands in the county and furnish it to the county. Can it be said that when he had done this, that his reports filed with the county were a listing, or valuation, or any other part of the assessment, of the lands? Nease did not determine what lands should be listed, nor how they should be listed nor classified, nor how they should be valued. That duty was left entirely to the assessing officers, where the law placed it, and in performing this duty they make use of such information as he furnished them.

(b) Appellees make the claim on page 82 of their brief that the board of equalization has no authority to compel the assessor to substitute its opinion for that of the assessor. If this were true, it would not alter the case. But, as a matter of fact, the board of equalization does have the power to change the assessment made by the assessor.

(See sections 58 and 62 of the statute quoted on page 131 of the appellant's brief.)

And the Supreme Court of Idaho has held that the conferring of this power upon the board of county commissioners is not in conflict with the constitution of Idaho.

Murphy vs. Board of Commissioners, 59 Pac. 715.

To support their position in this regard the appellees rely upon the case of *Blomquist vs. Board of County Commissioners*, 25 Idaho 292 (S. C.) 137 Pac. 174. This case holds that, under the constitution of Idaho, the power of assessing property is vested in the county assessor, and the county commissioners sitting as a board of equalization; and that the legislature cannot deprive them of this power by vesting it in a new body, created by the legislature and known as the Tax Commission. It recognizes that the board of county commissioners, sitting as a board of equalization, constitutes, under the constitution, a part of the assessing authority of the county. And it could not well do otherwise, in view of article seven, section twelve, of the constitution, which declares:

“The board of county commissioners for the several counties of the state shall constitute boards of equalization for their respective

counties, whose duties it shall be to equalize the valuation of the taxable property in the county, under such rules and regulations as shall be prescribed by law."

Therefore, the action of the county commissioners, in procuring the cruise of timber lands, is for the purpose not only of enabling the assessor properly to perform his duties, but also to enable the board itself, when sitting as a board of equalization, properly to perform its functions.

(c) Appellees seek to distinguish the case of *Pacific Timber Cruising Company vs. Clarke County, Wash.*, 233 Federal, 540. They claim that a ground for distinction lies in the fact that under the laws of the State of Washington the county commissioners are the chief executive officers of the county and the management of the county's business is vested in them by law.

There is no essential difference in this regard between the laws of Washington and the laws of Idaho. Sections 1898, 1899, 1901 and 1917 (22), volume I, of Idaho Revised Codes, are as follows:

"Section 1898. Every county is a body politic and corporate and as such has the power specified in this title or in other statutes, and such powers as are necessarily implied from those expressed."

"Section 1899. Its powers can only be ex-

exercised by the board of county commissioners, or by agents or officers acting under their authority, or authority of law."

"Section 1901. It has power, (1) to sue and be sued; * * * (5) to levy and collect such taxes for purposes under its exclusive jurisdiction as are authorized by law."

"Section 1917. * * *

22. To do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government."

Sections 3822, 3824 and 3890, volume II, of Remington and Ballinger's Codes of Washington, are as follows:

"Section 3822. The several counties in this state shall have capacity as bodies corporate to sue and be sued in the manner prescribed by law; to purchase and hold lands within its own limits; to make such contracts, and to purchase and hold such personal property, as may be necessary to its corporate or administrative powers, and to do all other necessary acts in relation to all the property of the county."

"Section 3824. Its powers can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law."

"Section 3890. * * *

6. To have the care of the county property and the management of the county funds and business, and in the name of the county to

prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law.”

It is not practicable to set out here in full all the statutes of the state of Idaho and the state of Washington in regard to the powers of county commissioners, but the above is sufficient to show that the whole management of county affairs, except in so far as has been vested in other officials, rests in the board of county commissioners to as full an extent under the laws of Idaho as under the laws of Washington. A more detailed examination of the several statutes makes this fact even more apparent. (See Sec. 1917 *et seq.*, Vol. I, Idaho Rev. Codes; Sec. 3890 *et seq.*, Rem. & Bal. Codes of Washington.)

In further attempt to distinguish the *Pacific Timber Cruising Company* case, 233 Federal, 540, the appellees rely upon the case of *Gen. Custer Mining Co. vs. Van Camp*, 2 Idaho, 40, (S. C.) 3 Pac. 22. In the latter case, the Supreme Court of Idaho held that a statute giving the right of appeal from decisions of the board of county commissioners did not authorize an appeal from that board when sitting as a board of equalization; because the board of county commissioners, when sitting

as a board of equalization, is acting in an entirely different capacity from that in which it acts when sitting as a board of county commissioners, as such. This decision affords no basis for a distinction between the laws of Idaho and the laws of Washington, for the Supreme Court of Washington has decided the same thing in the case of *Olympia Water Works vs. Thurston County*, 14 Wash. 268 (S. C.) 44 Pac. 267. In fact the Supreme Court of Idaho, in the later case of *Felthan vs. Board of County Commissioners*, 77 Pac. 332, in reaffirming its decision in the case of *General Custer Mining Company vs. Van Camp*, makes extended reference to the decision of the Supreme Court of Washington, in the *Olympia Water Works* case, *supra*, as a parallel case. When the Supreme Court of Washington rendered this opinion, the board of county commissioners constituted the board of equalization.

It is difficult to perceive how the fact that the board has this dual capacity is of any significance. However, at the time when the decision was rendered by the United States District Court of Washington, in the *Pacific Timber Cruising Company* case, the difference between the board of county commissioners as such and the board of equalization

was more marked in the State of Washington than in the State of Idaho, for the Washington statute then and now in force does not make the board of county commissioners alone the board of equalization, as is shown by Section 9200, Volume two of Remington and Ballinger's Codes of Washington, which provides as follows:

“The county commissioners, the county assessor and the county treasurer, or a majority of them, shall form a board for the equalization of the assessments of the property of the county. * * * ”

It is clear, therefore, that the fact that the board of county commissioners, when sitting as a board of equalization in Idaho, acts in a different capacity from that of a board of county commissioners, as such, affords no ground to distinguish the case of *Pacific Timber Cruising Company*, 233 Federal, 540, from the case at bar.

(d) The appellees place some reliance upon the tax commission statute, a portion of which is quoted on page 95 of their brief. Special reliance is placed upon section nine of the act, which declares, among other things, that “the commission shall prescribe a uniform system of procedure in the assessment of property. * * * ” It was not the intention of this statute to confer upon the

State Tax Commission the power to control the assessing officers of the county in their assessments of the property. The power to properly classify and assess property is fixed by the constitution in the assessor and the board of equalization. The manner in which they shall discharge their duties is determined by another statute, to-wit: Chapter 58 of Session Laws of 1913, the pertinent provisions of which are set forth as an appendix to the appellant's opening brief. If the board of county commissioners and the assessor should conclude that a cruise was necessary in order to enable them properly to assess timber lands, the State Tax Commission could not prevent them from having the cruise made. This is settled by the *Blomquist* case, *supra*, 137 Pac. 175, where the Supreme Court of Idaho held that the Tax Commission is but "an advisory board."

Moreover, if it should be assumed that the State Tax Commission would have the power, in prescribing a uniform system of procedure, to tell the assessor and the county commissioners whether they should or should not have timber lands cruised, the mere existence of that power would not be pertinent, unless it should appear that the State Tax Commission had in fact made some such rule, and

that the action of the board of county commissioners in this case was contrary thereto.

II.

We next notice appellees' claim that the Nease contract is in violation of section three of article eight of the constitution of Idaho.

(a) Appellees assert that the decision of the Supreme Court of Oregon, in the case of *Wingate vs. Clatsop County*, 71 Oregon, 94 (S. C.) 142 Pac. 561, is not in harmony with the previous adjudications of that court, and especially with the case of *Eaton vs. Minnaugh*, 43 Oregon, 473 (S. C.) 73 Pac. 754. A careful examination of these cases will show that there is no conflict. As this is clearly pointed out by the Oregon court in the *Wingate* case, it is not necessary for us to do so. In an earlier case the Supreme Court of Oregon had before it the question whether certain county warrants were in violation of the constitutional inhibition against county indebtedness, and, in sustaining them, the court applied the following test:

“It was such a service, so far as we are informed by the record, as the county could not well dispense with for the time being even, and perform understandingly and intelligently the functions pertaining to its organization.”

Municipal Securities Co. vs. Baker County et al., 54 Pac. 174.

If this test shall be applied in this case it will sustain the validity of the warrants in question; for it cannot be denied that the assessing officers of Clearwater County could not understandingly and intelligently perform the functions pertaining to the assessment of timber lands, which duties were imposed upon them by law, without having the information which could be procured in no practical way other than by cruising. The District Court in its opinion recognized the authority of the county commissioners to incur expense in securing information to enable the assessing officers intelligently to perform these functions. (Record page 190.)

(b) It should be borne in mind, also, in considering the Oregon decisions that the inhibitions of the Oregon constitution are more stringent than those of the Idaho constitution. Under the Oregon constitution the prohibition above five thousand dollars, except for certain specified purposes, is absolute. Under the Idaho constitution, there is no limitation of the amount of indebtedness which the county commissioners may incur, if it is for an ordinary and necessary expense authorized by the general laws of the state. It was not the intention of the framers of the Idaho constitution to make the prohibition against the power of the com-

missioners to contract indebtedness absolute. It was undoubtedly their intention to leave the county commissioners free to incur whatever debts should be necessary to enable themselves and other county officers to discharge the functions which the legislature should from time to time impose upon them by law. A narrower construction of the proviso would deprive it of all meaning.

The constitution of Idaho creates but a mere skeleton of county government. Article eighteen, section five of the Idaho constitution provides as follows:

“The legislature shall establish, subject to the provisions of this article, a system of county governments which shall be uniform throughout the state. * * *”

Section eleven of the same article is as follows:

“County, township and precinct officers shall perform such duties as shall be prescribed by law.”

The functions, duties and powers of counties and county officers are found almost wholly in the statute law. The makers of the constitution recognized that the counties are subordinate, political subdivisions of the state, that would, in the ordinary course of events, be clothed from time to time with varied functions in the administration of

the government. They also recognized that when the legislature should from time to time impose certain duties of a governmental nature upon the county officers, that the discharge of those duties ought not to be left dependent upon the vote of the people of the several counties.

Now, the legislature has seen fit to devolve upon the county governments practically the whole duty of providing revenue, not only for themselves, but for the state. These are functions which the county officers are authorized by the general laws of the state to perform. They are not only authorized but required to perform them.

The appellees argue in opposition to this view that the cruise of timber lands was not necessary to enable the assessing officers of the county to perform these functions, because it was possible for them to perform the functions in a slipshod manner, without the information which would be afforded them by a cruise. The statute, however, requires that they shall perform these functions in a careful and competent manner. The test as to whether the expense is a necessary one is whether it is necessary to enable the county officers to perform the functions imposed upon them by law in the manner required by the law, i. e., in a proper and intelligent manner.

(c) Some point is made by the appellees, on page 87 of their brief, of the fact that a cruise of timber cannot be absolutely accurate in any event. This is no reason why the problem of procuring information in regard to timber lands should not be dealt with in a sensible and practical way. If the behest of the statute is to be obeyed, that the assessor shall determine "as nearly as practicable the full cash value" of lands, it is necessary that the information to enable him to do so shall be procured as nearly as practicable. And the fact that it may not be possible to determine the facts with absolute accuracy does not relieve the county officers of the duty of solving the problem in a practical way to the best of their judgment. The argument of the appellees is that because it is not practical for the assessing officers to get absolutely accurate information, that, therefore, they cannot procure it "as nearly as practicable."

Notwithstanding all that appellees say about the essential inaccuracy of the results of cruising timber, the fact remains that all dealing in timber lands is based upon cruises; this is common knowledge. It may be true that occasionally the results of competent cruisers will show, because of peculiar circumstances, abnormal and excessive variations,

but the merits of cruising must be determined by the normal. The normal variation should be from ten to twenty-five per cent (Record, pages 385, 427, 434). The contract between Nease and the county recognized twenty per cent as the limit of allowable variation. (See paragraph six of the contract, pages 8 and 9 of appellant's brief.) To have knowledge within eighty per cent of accuracy is certainly better than complete ignorance.

(d) Appellees insist that the expense incurred was not a necessary expense, because the work of cruising was improperly done, and, therefore, did not supply to the county as accurate information as it would have received had the work been better done. The question whether Nease properly complied with his contract can have no bearing upon the question of whether the work performed was a necessary expense. In considering the question whether a contract made by the county is or is not a necessary expense, the only question for the court is whether the thing contracted for is a thing which, under the constitution, the county commissioners have a right to procure. The question whether the quality of the work done, or article procured, is such as to adequately meet the necessity is for the county commissioners alone to deter-

mine. If the thing contracted for belongs to the class of things which are necessities under the general laws of the state, it is within the powers of the county commissioners to procure the same, and their judgment as to its quality and sufficiency cannot be reviewed by the courts. Any other construction of the constitutional provision would render it impossible for parties safely to contract any indebtedness through the commissioners, and would place the whole matter of incurring county debts for necessary expenses under the tutelage of the courts.

The county commissioners have authority to purchase stationery and other office supplies necessary for themselves and the other county officers; this is unquestionably a necessary expense. If the county commissioners should purchase stationery and books for the use of the county treasurer, could the court declare the debt thereby incurred unconstitutional because, in the opinion of the court, such stationery and books were not as adequate for the treasurer's use as they should be?

In the debates in the constitutional convention, set out in the brief of the appellees, reference is made to witness fees as a necessary expense (see page 158, appellees' brief). If, in the prosecution of

a criminal case, the county officers should procure the attendance of witnesses, and if at the trial the testimony of such witnesses should be by the court wholly excluded because either immaterial or incompetent, could the court declare that the expense incurred for the procuring of such witnesses was unconstitutional because, in the opinion of the court, such witnesses were unnecessary? *If a cruise of timber lands is necessary to enable assessing officers properly to perform their functions, then the question of what kind of a cruise will answer their purpose is for the judgment of the county commissioners, so long as that judgment is exercised in good faith.*

(e) It is stated by the appellees that there was ample time for holding of a popular election. This is immaterial, for we are now dealing with the question of power. If the county commissioners had the power to contract the indebtedness without a vote of the people, it is valid; if they did not have such power without the vote of the people, it is invalid, no matter whether there was ample time for an election or not.

(f) The amount of the indebtedness incurred has nothing to do with the question. If it is in fact a necessary expense, authorized by the general

laws of the state, there is, under the constitution, no limitation as to amount. It may be quite true, as suggested by the appellees, that the county commissioners might have power to contract debts of considerable size, if necessary. But we fail to see any lurking danger to the county so long as the expenses are limited to such as are necessary to enable the county properly to perform the functions imposed upon it by law. Of course, there is the possibility that the judgment of the county commissioners as to the quality of a thing procured may not always be of the best, but this is a danger that is inherent in the conferring of all political power. If the county continues to use the cruise, it will speedily pay for itself (see Record, page 417). Perhaps it has already done so.

(g) Some point is made on page 114 of the appellees' brief of the statement made by us that the assessor himself cannot be compelled to cruise all the timber lands in Clearwater County. He cannot be so compelled, because he has not the means nor the qualifications. It is a work for experts; the assessor is not required to be a timber cruiser.

(h) We are not unmindful of the rule that this court would be bound by the adjudications of the

Supreme Court of Idaho as to the meaning of its constitution. But an examination of all the decisions of that court, construing the constitutional provision in question, convinces us that this court can derive little assistance therefrom in deciding the question now before it. The decision of District Judge Flinn, referred to by the appellees, on pages 116-117 of their brief, not having been published, we have not had an opportunity to examine it. In any event, being a decision of a lower court, it would not be controlling.

(i) With reference to the appellees' claim that the cruising of United States and state unpatented lands and untimbered lands was not so necessary as to create a necessary expense within the meaning of the constitution, we have nothing to add to what has been said in our opening brief with reference to the United States and state lands.

It is stated by the appellees, on page 65 of their brief, that there is nothing in the record to show the amount of state and government land included in the warrants in this suit. We think we have shown the contrary in our opening brief at pages 83 to 87, where we invite the appellees to show any inaccuracy in our computations. In view of the fact, however, that Nease's work was accepted and

his bills allowed by the board of county commissioners, which constituted at least a stated account between him and the county, the burden is upon the county to show the extent, if any, to which the bills, as allowed, were erroneous.

With reference to the untimbered lands, we would call the attention of the court to the fact that these untimbered lands are openings of comparatively small extent, either caused by burns or natural absence of timber, or clearings throughout the timbered section. Under the terms of his contract, Nease was required not only to cruise the timber but to make reports showing "all openings, burns, marshes. * * *" (See paragraph two of the contract on page 6 of our opening brief.) One of the difficulties which the assessing officers had encountered was in regard to such burns and openings (see the testimony of Harrison, page 303, Zelenka, 361). One object of the cruise was to meet this difficulty and it did so effectively (testimony of Harrison, 303-4, 402-3; testimony of Nease, page 351). As a matter of fact the proper setting off of these burns and openings is more trouble to the cruiser than it would be to cruise them if they had timber on them. (Testimony of Murray, Record, page 379.) In view of the terms of the

contract and the object of the cruise, it is clear that it was contemplated by the parties that these burns and openings should be included by Nease in his reports and that this work was to be included in the contract price of twelve and one-half cents per acre. It is also clear that it was a necessary part of the whole work of supplying to the assessing officers information to enable them properly to classify and assess the lands within the timbered area of the county.

It is common knowledge that there are openings in all timbered tracts, varying in size from small fractions of an acre to several acres. The questions presented by these openings had to be dealt with in a practical way in the execution of the contract; and it was for the commissioners to determine to what extent such openings were within the terms of the contract.

There is no ground for excluding compensation for such lands.

III.

(a) With reference to the objection to the form of the warrants, appellees concede, on page 126 of their brief, that Section 2056 of the Idaho Revised Codes, set out in full on page 91 of our opening

brief, covers the whole subject matter. This section was enacted in 1899, subsequent to the issuance of the warrants which were before this court in the case of *Bingham County vs. National Bank of Ogden*, 122 Federal, 16. The warrants clearly comply with the requirements of this section, and are, therefore, sufficient in form.

IV.

ALLOWANCE OF THE BILLS.

Our claim under this head is not that county warrants are negotiable instruments, nor is the question simply how far the county is bound by the issuance of the warrants: but it is rather how far it is bound by the action of the county commissioners in accepting the work of the contractor and allowing his bills, for which the warrants were issued. As we understand the appellees' argument under this head, it is that some fraud and deceit was practiced upon the board, to induce it to allow these bills. This deceit, it is alleged, consisted of the following facts: first, that Nease included in his bills a charge for cruising some state and United States lands; second, that he included a charge for cruising marshes, burns and townsites; third, that a notation appears on the field report of

one of the cruisers, Archie Young: "These two forties were actually cruised, balance done in camp" (see appellees' brief, 123, 133-134); fourth, that some of the work of some of the cruisers was revised and corrected by Nease before filing the same with the county; fifth, that there was an attempt to conceal the fact that a large part of the lands were single run.

In view of the fact that the District Court in its opinion held that there was no fraud, either in letting the contract or allowing the bills, we take it that it is unnecessary to notice these contentions of the appellees. If, however, this court should see fit to examine into the question, we submit the following:

First: With reference to the government and state lands, there was certainly no deceit practiced upon the county. So far as the United States lands are concerned, it was understood by the county commissioners that Nease was to include in his cruise small isolated tracts of government lands lying within the timbered area. There was certainly no deceit about this (see Record, pages 324, 343, 356, 470).

With reference to state lands, the testimony

is not harmonious. One of the commissioners and the assessor seemed to think that isolated tracts of state lands were to be cruised by Nease the same as government lands (Record, pages 355-421). Nease, however, is of the opinion that whatever state lands were cruised was by mistake (Record, pages 343, 326). If it was a mistake, it was the mistake of the county officers in failing to mark out the state lands upon the maps which were given to Nease showing the lands to be cruised by him (Record, page 325). The lands which Nease was to cruise were designated to him by the county officers (Record, pages 354-5, 394, 419, 421). The state lands are either upon the same footing as the United States lands, or were cruised by mistake. In either event there was no deceit.

Second: With reference to his charging for cruising of burns, openings, marshes and so forth, we beg to say that this is covered by paragraph two of his contract. With reference to the cruising of townsites, appellees have reference to what is known as the Town of Weippe. This consisted of a saw-mill and its appurtenant population, and there was over three million feet of standing timber on the section (Record, pages 351, 298).

We fail to see how there could possibly have been any deceit practiced on the commissioners with regard to the cruising of either the government lands or the burns, openings and the Town of Weippe. All these things appear upon the reports which Nease filed with the county. In fact, the information in regard to these things was compiled by Mr. Becker, one of the counsel for the appellees, from these very reports now on file with the county (Record, page 287). These facts were actually known to the commissioners at the time the bills were allowed (Record, page 355). How could there be any deceit under such circumstances?

Third: With regard to the notation upon Young's field reports, there is no evidence as to who made this notation. It was made neither by Nease, nor by Young (Record, page 244).

Fourth: The revising of some of the work of some of the cruisers was done as a result of the checking of their work by the checkers, and is the usual and proper method of correction (Record, pages 377, 378, 390, 409, 347, 348). That there was no fraud or deceit about it is shown by the fact that these corrections appear on the face of the cruiser's field reports (Record, page 347).

There was in the preparation of the maps some

jibing. The cruisers in making their topographic maps did not use surveyor's instruments to trace out with accuracy the locations of streams, ridges and so forth. Consequently, for example, a stream shown upon one cruiser's topographic sketch of a section might not jibe with a continuation of that stream as shown by the sketch of an adjoining section made by another cruiser, or even by the same cruiser. In making up the permanent maps showing these topographical features, to be filed with the county, a certain amount of jibing was necessary in order to connect up such natural features (Record, page 396). This was a matter wholly insignificant in itself, but proper.

Fifth: There was no attempt to conceal the fact that cruisers were single running (Record, page 472). How could it be concealed with a county checker in the field? In fact, some of the single running was done in the actual presence of a hostile spotter (Record, page 461).

V.

DEFECTIVE WORK.

(a) It is very difficult for us to determine from the appellees' brief what their claim is in regard to defective work. The evidence offered to show defective work was admitted by the trial court for the purpose solely of permitting the defendant county to show, if it could, that the work was so defective that it could not have been honestly accepted by the county. It was admitted as a part of defendants' attempt to show bad faith, and not for the purpose of reviewing the action of the county commissioners in accepting it (Record, pages 234, 245 and 264).

That there was no such fraud was found by the trial court, and will be demonstrated by us in pages following.

There being no fraud, the action of the county commissioners in allowing the bills is conclusive. And in any event, under paragraph seven of the contract, the county is bound to allow Nease the opportunity to make good any defective work. It will have no claim against Nease for any defective work until such opportunity shall have been offered him and he shall have failed to do so. Therefore,

under no aspect of the case, has the county as yet any set-off or counter-claim for defective work. Any such set-off or counter-claim is one that must arise, if at all, in the future against Nease, and cannot be urged against this appellant, who is the assignee of Nease.

North Bergen vs. Eager, 41 N. J. L. 184.

Bush and Howard vs. Cushman, 27 N. J. Eq. 131.

Coster vs. Griswold, 4 Edward's Chancery, 364.

Marling vs. Fitzgerald, 138 Wis. 93, (S. C.) 120 N. W. 388.

, VI.

THERE WAS NO FRAUD EITHER IN THE MAKING OR THE PERFORMANCE OF THE CONTRACT.

(a) We take it that it is unnecessary for us to reply to this part of the appellees' brief, in view of the fact that the trial court found that there was no such fraud. In case, however, the court feels it its duty to examine the question, we submit the following:

Most of the appellees' brief on this question consists rather in the reiteration of harsh terms than in the adducing of any proof to justify them.

What the appellees have to say under this heading is scattered through their brief under various disconnected headings, but may be all included under their attempt to show: (1st) fraud in the making of the contract, and (2nd) fraud in its performance.

Before specifically examining the appellees' argument on these points, we cannot refrain from calling the court's attention to the fact that the appellees' statement of what the evidence shows is so frequently one-sided, and at times so distorted, that the reading of the evidence by the court will be sufficient without any remarks from us.

FIRST: *The manner of entering into the contract.*

There is a seeming implication on pages 4 and 5 of appellees' brief that the county commissioners were at fault in entering into the contract with Nease, because of the fact that Judge Flinn had held that a similar contract with Kootenai County was invalid. It appears on page 91 of appellees' brief that Judge Flinn's decision was filed on May 11, 1914, which was long after Nease's second contract with Clearwater County was made.

It is next argued that there was great haste

shown in making the contract. This argument is directed chiefly to the first contract which was subsequently rescinded. However, the evidence is conclusive that the matter had been under consideration for a long time (Record, pages 414, 301, 302). The reason why the assessor insisted upon prompt action was that the time was drawing near when he must commence his assessment work for that year (Record, page 417).

The John Lewis suit is also relied upon as a circumstance showing bad faith (see appellees' brief, pages 14 *et seq.*). We shall not add anything to what we have said in our opening brief as to the Lewis suit except to suggest that there is no justification for the appellees' assumption that the county commissioners and Nease were bound to accept as true the extravagant allegations contained in the complaint in that suit and in the affidavits which were attached to the same. As we pointed out in our opening brief, the county commissioners made a thorough investigation of Nease before entering into the contract with him.

SECOND: *Fraud in the performance of the contract.*

The claim of the appellees in this regard is very closely related to their claim that there was

fraud practised upon the commissioners to persuade them to accept the work and allow Nease's bills. It is very difficult at times to determine whether when the appellees are calling attention to certain parts of the evidence they do so in support of one or the other of these claims.

The claim of the appellees seems to be that the manner in which the contract was performed was such as to show that the performance by Nease was but part of a general scheme to defraud the county.

This claim is so closely related to the claim in regard to defective work, as such, that its discussion may entail some repetition. It would serve no useful purpose to attempt to classify the various circumstances which the appellees claimed are proved by the evidence and tend to establish their position. We shall, therefore, notice such of them as we think merit attention, in the order in which we find them in the appellees' brief.

One of the circumstances relied upon by the appellees is the fact that a large part of the lands were cruised by what is called the "single run" method. Appellees' contention in this regard seems to be that a single run method of cruising can, under no circumstances, be of any value. They cite in support of this certain affidavits appearing on pages

73 and 79 of the record. These affidavits are not evidence; they are but exhibits constituting a part of the complaint in the Lewis suit. The testimony of Benjamin Bush (Record, page 292) is cited. This witness says that he knows of nobody else that uses his method of cruising (Record, page 294), and that he has never had any experience with double run cruising (Record, page 293). The testimony of the witness Wherry is also cited (Record, page 271). This witness testified that a complete, accurate and thorough estimate could not be made on a single run cruise. Strictly speaking, this might be said of any cruise. We call the court's special attention to what this witness says in regard to this matter on page 272 of the record. Single run cruising is a well recognized method (Record, 380, 375, 410, 433). The term "single run" does not in itself accurately define any system. There are many systems of single running (Record, 376, 378). For example, Murray, who was a witness for the defendants, testified that his method of single running actually covered a larger proportion of the tract cruised than the double run system of the witness Wherry (Record, 380). The custom is to allow the cruiser to use his own judgment as to whether the particular tract being cruised should be cruised by a double method, or the single run method, or any

other method. (See testimony of Hamer, Record, 431, 432.) The testimony is overwhelming that Nease's cruisers were not instructed by him to single run, but that it was left to their judgment to single run, or double run, or use any other method that their judgment dictated. See testimony of the following witnesses:

Hamer, Record, page 436.

Conry, Record, page 426.

Clark, Record, page 441.

Penegor, Record, pages 443 and 444.

Croman, Record, page 448.

Miller, Record, page 453.

Hart, Record, page 458.

Kelley, Record, page 459.

Olinger, Record, page 459.

Johnson, Record, page 462.

Dockery, Record, page 467.

Nease, Record, page 471.

The fact that there was more single running done in the fall than in the spring is readily accounted for by the fact, as explained by the cruisers, that they became more familiar with the country, and the character of the timber.

Appellees' statement, on page 31 of their brief, that during the fall all the timber was single run, is

not true; there is absolutely no evidence to support this statement. For instance, Snyder, who did most of his cruising in the fall, double run it all (Record, page 457). Johnson double run seventy-five per cent (Record, page 462). Miller double run eighty per cent (Record, page 453); and all cruisers double run when in their opinion it was necessary.

Another circumstance relied upon is that Nease compared the results of his cruise with those of some of the large timber owners. There was no secret about this, and we cannot understand how anyone could think that there was any impropriety in it. No changes were made in Nease's work because of these comparisons (Record, pages 327, 328). The fact that the estimates of one of the companies on some of its land was larger than that of Nease's was explained by the company as being due to the fact that it had been "soaked" by the cruiser under which its estimate had been made (Record, pages 327, 336). Moreover, Nease's estimates as a general thing over-ran those of the company (Record, page 336). It was perfectly proper for the timber owners to acquaint themselves with Nease's cruise, in order to determine whether they would request a re-cruise, as provided by paragraph 6 of Nease's contract.

Appellees call attention to the fact that the cruiser, Archie Young, cruised two sections by doing nothing more than walking up the trail and back again (Record, page 277). It was not possible to procure Young as a witness (Record, page 470). These two sections were 24 and 25. Defendants' exhibits 16 and 17 show that these two sections were burned. This fact is not disputed, and undoubtedly accounts for the manner in which Young covered them.

Some point is made of the manner in which the elevations were taken. It is claimed that they were not taken in all cases according to the instructions given by Nease to the cruisers. (See appellees' brief, pages 49 and 50.) It is immaterial whether these elevations were taken by the cruisers in accordance with Nease's instructions, if they were taken in such a way as to comply with Nease's contract with the county. This contract (see paragraph two) does not require any specific number of elevations to be taken, nor that they be taken in any particular place on a governmental subdivision. The only requirements is that they be taken by means of aneroid barometers. Appellees' objection is that the elevations were not always taken by the cruiser at the exact point where he stood with the

aneroid. This is explained by the following witnesses:

Hamer, Record, page 438.

Penegor, Record, page 446.

Conry, Record, page 430.

Miller, Record, page 455.

Olinger, Record, page 461.

In considering this matter, it must be borne in mind what the purpose of taking elevations was. It was for the purpose only of giving a general idea of the nature of the ground as it would affect logging operations (Record, page 450).

In view of the fact that there were over 500,000 acres of land cruised by Nease' men, and in view of the further fact that all of the original reports turned in by the cruisers to Nease were freely submitted to the representatives of the county for their examination (Record, page 473), the criticisms of the work seem trivial indeed.

Not only does the record fail to show any evidence of fraud, but the reading of it must convince the court that the contract was entered into and performed in the utmost good faith.

Respectfully submitted,

PETERS & POWELL,

H. B. BECKETT,

Attorneys for Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit. 4

Apostles on Appeal.
(IN TWO VOLUMES.)

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American Steamship "BEAVER,"

Appellant,

vs.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion, Claimant of the Steam Schooner "NE-
CANICUM," Her Engines, Boilers, Boats,
Tackle, Apparel and Furniture,

Appellee.

VOLUME I.
(Pages 1 to 384, Inclusive.)

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

Filed

APR 23 1917

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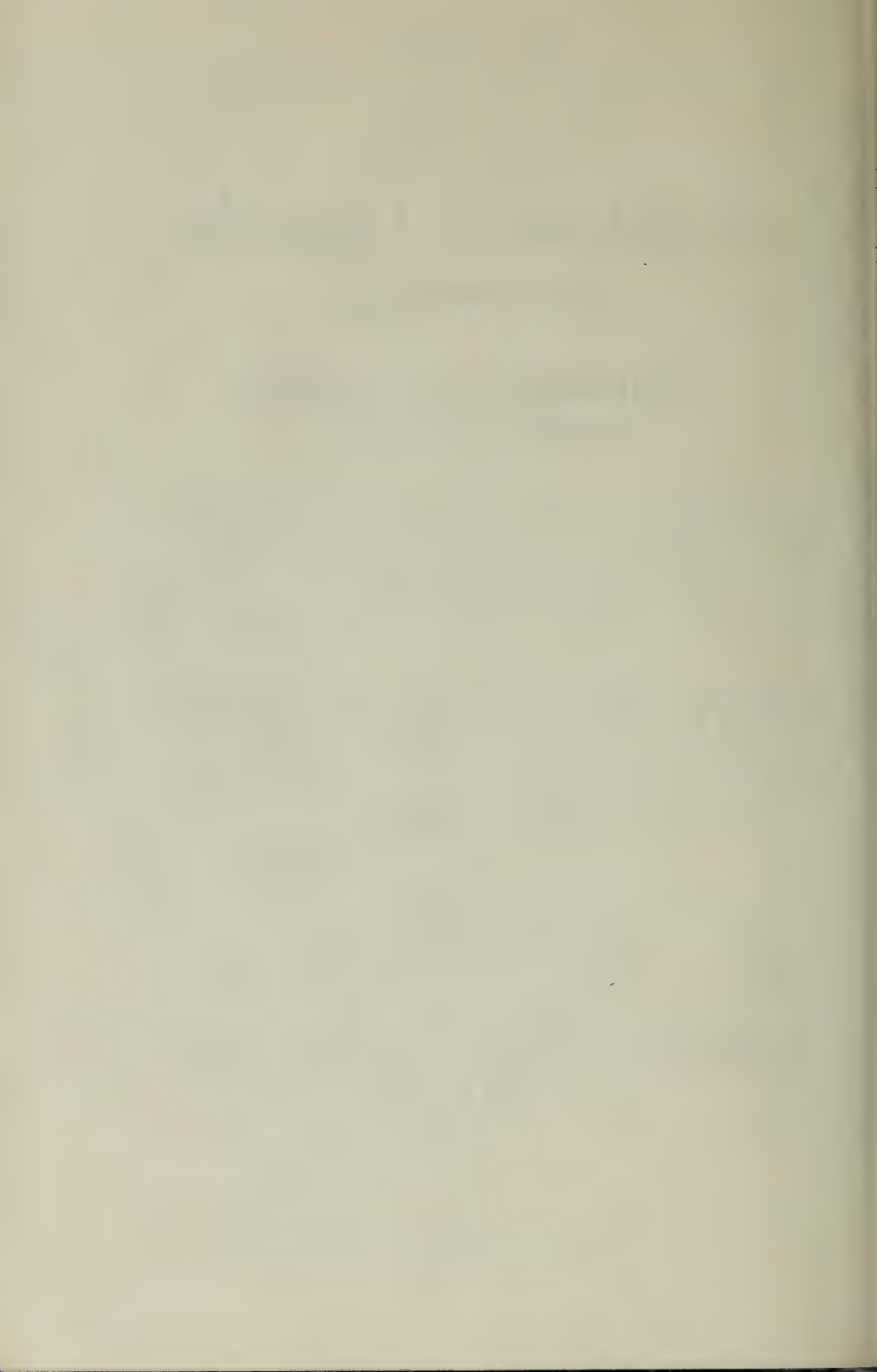
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libelant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Praeceptum for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in this court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

(1) All those papers required by Section 1 of Paragraph 1 of Rule 4 of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit;

(2) All the pleadings in said cause and all the exhibits annexed thereto; [1*]

(3) All the testimony and other proofs adduced in said cause, including the testimony taken at the trial, all depositions taken by either party and admitted in evidence, and all exhibits introduced by either party, said exhibits to be set up as original exhibits;

(4) The opinion and decision of the Court;

(5) The final decree and notice of appeal;

(6) The assignments of error.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Libelant and Appellant.

Service of the within Praecipe for Apostles on Appeal and receipt of a copy is hereby this 17th day of March, 1917.

W. S. BURNETT,

DENMAN & ARNOLD,

Proctors for Claimant.

[Endorsed]: Filed Mar. 17, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

Statement of Clerk U. S. District Court.

*In the Southern Division of the District Court of the
United States, Northern District of California,
First Division.*

TITLE OF CAUSE.

No. 15,513.

**SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY,** a Corporation, Owner of the
American S. S. "BEAVER,"

Libelant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion, Claimant. [3]

PARTIES.

Libelant: San Francisco & Portland Steamship Co.,
a corporation.

Respondent: Steam Schooner "Necanicum," her en-
gines, boilers, etc.

Claimant: Leggett Steamship Company, a corpora-
tion.

PROCTORS

for

Libelant: Ira A. Campbell, Esq., and McCutchen,
Olney & Willard.

Respondent and Claimant: William Denman, Esq.,
and Denman & Arnold.

PROCEEDINGS.

1914.

January 2. Filed verified libel for damages, caused by collision, (\$45,000.00).

Issued monition for the attachment of the Steam Schooner "Necanicum," her engines, etc., which monition was afterwards, on the 6th day of January, 1914, returned and filed, with the following return of the U. S. Marshal endorsed thereon:

"In obedience to the within Monition, I attached the Steam Schr. 'Necanicum,' etc., therein described, [4] on the 2d day of January, 1914, and have given due notice to all persons claiming the same that this Court will, on the 13th day of January, 1914 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named Steam Schr. 'Necanicum,' etc.

I further return that I served a copy of the within Monition on Austin Keegan, Captain of the Steam

Schooner 'Necanicum,' etc., the person in whose charge I found the within named Steam Schooner 'Necanicum,' etc., at Point San Pablo, Contra Costa County, California, on the 2d day of January, 1914.

C. T. ELLIOTT,
United States Marshal.
By T. F. Kiernan,
Office Deputy.

San Francisco, Cal., January 3d, A. D. 1914."

- January 23. Filed Claim of Leggett Steamship Company, a corporation, to the Steam Schooner "Necanicum," etc.
Filed Answer of Leggett Steamship Company, a corporation.
- March 9. Filed stipulation that the Steam Schooner "Necanicum" may be released upon the filing of a bond, in the sum of \$55,000. [5]
- March 9. Filed Admiralty Stipulation (bond) in the sum of \$55,000, for release of Steam Schooner "Necanicum," with A. B. Hammond and W. H. Hammond as sureties thereon.
- June 16. Filed Depositions of Walter N. Beckwith et al. on behalf of Respondent, taken before Francis Krull, U. S. Commissioner.

October 15. The Court, this day, made an order that the cause entitled Leggett Steamship Company, a corporation, vs. San Francisco and Portland Steamship Company, a corporation, No. 15,675, be consolidated with this cause, for hearing.

The cases, as consolidated, this day came on for hearing, in the District Court of the United States, for the Northern District of California, San Francisco, before the Honorable M. T. Dooling, Judge, after hearing duly had, the cause was continued until October 16th, for further hearing. Hearings were had on October 16th, 20th, 21st, and 22d, respectively, on which last day, the matters were ordered submitted, on briefs to be filed.

October 20. Filed Deposition of Theodore J. Hewitt, taken on behalf of libellant, before John P. Hannon, a notary public, at Portland, Oregon.

21. Filed Deposition of Alfred F. Pillsbury, taken on behalf of libellant, before Francis Krull, U. S. Commissioner. [6]

1915.

July 19. Filed five volumes of testimony, taken in open court.

August 19. The causes, as heretofore consolidated, this day, came on for argument, after which the causes were ordered submitted.

December 10. The Court this day filed an opinion, in which it was ordered that the Libel in this cause (15,513), be dismissed; holding the "Beaver" (owned by San Francisco & Portland S. S. Co.) responsible for collision, and referring cause to U. S. Commissioner to ascertain and report damage sustained by the "Necanicum."

13. Filed Final Decree.

1916.

June

12. Filed Notice of Appeal.

Filed Bond on Appeal in the aggregate sum of \$1,000, with the National Surety Company, as surety. Filed Assignment of Errors. [7]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libellant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

Libel.

To the Honorable M. T. DOOLING, Judge of the
United States District Court for the Northern
District of California:

The libel of the San Francisco & Portland Steamship Company, a corporation, against the steam schooner "Necanicum," her engines, boilers, boats, tackle, apparel and furniture, in a cause of collision, civil and maritime, alleges as follows:

I.

That the San Francisco & Portland Steamship Company, libellant herein, is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and is and was during all times herein mentioned the owner of the steamship "Beaver," an American vessel of [8] 4,507 tons gross register, whereof E. W. Mason late was and now is master.

II.

That the steam schooner "Necanicum," respondent herein, is an American vessel of — tons gross register, and is now in the port of San Francisco, State of California, and within the jurisdiction of this Honorable Court.

III.

That heretofore, on the 30th day of October, 1913, at about the hour of 2:18 P. M., said steamship "Beaver" was run into and seriously damaged by said steam schooner "Necanicum"; that prior to and at the time of said collision said steamship "Beaver" was proceeding southward along the coast of California, between Point Arena and Point Reyes, on a course approximately South 50° East, and on or about the hour of 2:14 P. M., the officers of said "Beaver" sighted said "Necanicum" ahead, from a mile to a mile and a half distant, bearing slightly on the "Beaver's" port bow, and proceeding northward on a course approximately parallel with that of said "Beaver"; that upon sighting said steam schooner "Necanicum," the master of said steamship "Beaver" blew a one blast passing whistle and altered her course to port; that no answer to said signal was received from said "Necanicum," and thereafter, approximately half a minute later, the master of said "Beaver" blew a second one blast passing whistle, which whistle was answered by said "Necanicum" with a like signal, thereby consummating an agreement that said vessels were to pass on the port side of each other; that immediately after said passing signals had been exchanged, [9]

however, said "Necanicum" was observed by the officers of said "Beaver" not to be altering her course to starboard, as required by said signals, but swinging to port toward the course of said "Beaver"; that thereupon the engine of said "Beaver" was reversed full speed astern and her helm put hard aport, and, simultaneously therewith, the master of said "Beaver" gave three blasts of her whistle, indicating to said "Necanicum" that the engine of said "Beaver" was working full speed astern; that, in the meantime, without responding to said three blasts, said "Necanicum" continued to swing to port toward said "Beaver," and notwithstanding the reversing of said "Beaver's" engine and the hard aporting of her helm, she was unable to avoid said collision, and said "Necanicum" struck said "Beaver" on the latter's port bow, at nearly right angles, approximately twelve feet abaft her stem; that immediately thereafter said "Necanicum" backed away, and shortly became lost in the fog which afterward set in.

That from prior to said "Beaver" passing Point Arena the day was fair, and a light drifting fog at various short intervals prevailed, during all of which time the officers and lookout of said "Beaver" could see a distance of from not less than two to ten miles, and, during all of which times, as conditions required, the automatic fog signal of said "Beaver" was regularly blown, and a moderate speed maintained, as required by law.

IV.

That at all of said times proper and competent

officers were on watch and a proper and efficient lookout [10] was maintained on said "Beaver"; that said collision was not caused by any fault or neglect in the navigation of said "Beaver," as required by the International Rules of Navigation, but was solely caused by the careless and negligent navigation of said "Necanicum" in that she did not have on watch proper and competent officers, and did not maintain a proper and efficient lookout, and did not alter her course to starboard so as to pass said "Beaver" to port, as required by said passing signals, and did not stop and reverse on receiving said signals from said "Beaver," and did not alter her course to starboard when danger of collision became imminent.

V.

That by reason of said collision, said "Beaver" was seriously and extensively damaged about her bow, necessitating her drydocking and repair, to libelant's damage for said drydocking and repairs, and for loss of earnings while being laid up for repairs, in the approximate sum of forty-two thousand (42,000) dollars.

That further, by reason of said collision, a general average resulted on account of general average expenses and disbursements incurred by libelant, in the approximate sum of three thousand (3,000) dollars.

VI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law, according to the practice of this Honorable Court, may issue against the said steam schooner "Necanicum," her engines, boilers, boats, tackle, apparel and furniture, and that she may be condemned and sold to answer for the damages alleged in this libel, and that this Court will hear the evidence which libelant will adduce in support of its libel, and will enter a decree in favor of libelant for the above-mentioned damages, and will order the same to be paid and satisfied out of the said proceeds of the said steam schooner "Necanicum," together with interest and costs of libelant, and will otherwise right and justice administer in the premises.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Libelant. [12]

State of California,

City and County of San Francisco,—ss.

H. W. Deans, being first duly sworn, deposes and says:

That he is an officer of libelant, to wit, assistant to general manager, and agent in the State of California; that he makes this verification for and on behalf of said libelant; that he had read the foregoing libel, and knows the contents thereof, and believes the same to be true.

H. W. DEANS.

Subscribed and sworn to before me this 2d day of January, 1914.

[Seal]

FRANCIS KRULL,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Jan. 2, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [13]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 13th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY

vs.

Stm. Schr. "NECANICUM," etc.

Minutes of Court—January 13, 1914—Proclamation.

The U. S. Marshal having returned upon the monition issued herein that "In obedience to the within monition, I attached the Steam Schr. 'Necanicum,' etc., therein described, on the 2d day of January, 1914, and have given due notice to all persons claiming the same that this Court will, on the 13th day of January, 1914 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named steam schr. 'Necanicum,' etc."

On motion of J. McKeon, Esqr., proclamation was duly made for all persons having anything to say to

appear and answer the Libel herein, and on like motion claimant herein was granted ten days to plead to said libel. [14]

*In the United States District Court, for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libelant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

**Claim of the Leggett Steamship Company, a
Corporation, etc.**

And now Leggett Steamship Company, a corporation, owner of the steam schooner "Necanicum," her engines, etc., intervening for its own interests in said steamer "Necanicum," etc., appears before this Honorable Court and makes claim to the said steamship, her engines, etc., as the same are attached by the marshal, under process of this Court, at the instance of San Francisco & Portland Steamship Company; and the said Leggett Steamship Company avers that it was in possession of the said steamship at the time of the attachment thereof, and that it is the true and *bona fide* owner of the said steamship, and that no other person is the owner thereof.

WHEREFORE it prays to defend accordingly.
LEGGETT STEAMSHIP COMPANY.

By W. S. BURNETT,
Vice-President.

Subscribed and sworn to this 22d day of January,
1914, by W. S. Burnett, [15] the vice-president
of the said Leggett Steamship Company, acting on
behalf of the said steamship company, before me.

[Seal] M. I. LAWRENCE.

A Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 27, 1914.

[Endorsed]: Filed Jan. 23, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [16]

*In the United States District Court, for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libellant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

Answer.

To the Honorable M. T. DOOLING, Judge of the
United States District Court, for the Northern
District of California:

The answer of the Leggett Steamship Company, a corporation, claimant of the steam schooner "Necanicum," to the libel herein admits, alleges and denies as follows:

I.

Alleges that said claimant is a corporation duly organized and existing under the laws of the State of New Jersey, and that at all times in the said libel mentioned, and at the time of the seizure of the said vessel, it was the owner thereof.

II.

Answering paragraph III of the said libel, claimant alleges that it is ignorant of the exact course of the steamship "Beaver," as she proceeded southward along the coast of California between Point Arena and Point Reyes, wherefore it calls for proof thereof if the same be pertinent; denies that at the hour of 2:14 P. M., or thereabouts, the officers of said "Beaver" sighted the said "Necanicum" a mile to a mile and a half ahead, or at all, bearing slightly, or at all, on the "Beaver's" port [17] bow; alleges that it was ignorant of the exact course of the "Beaver," wherefore it is unable to answer the allegation that the courses were approximately parallel and calls for proof of the same if the same be pertinent; answering the allegations concerning the signals alleged to have been given by the steamship

“Beaver,” denies that the master of said “Beaver” blew a one blast passing signal prior to any passing signal given by said “Necanicum,” and in that behalf alleges that the only signal given by said “Beaver” was a one-blast signal in reply to a two-blast signal given by the said “Necanicum” at the time that the said “Beaver” was bearing from the said “Necanicum” a very considerable distance upon her starboard bow; denies that two one-blast passing signals were blown by said “Beaver”; denies that said “Necanicum” answered a one-blast passing signal with any one-blast passing signal, thereby or at all consummating an agreement that said vessels were to pass on the port side of each other; alleges that it is ignorant of the observations of the officers of the “Beaver”; admits that at the time the “Beaver” blew one whistle in response to the two whistles of the “Necanicum,” the “Necanicum” was swinging to port but not towards the course of the “Beaver” as it was when the two whistles were blown from the “Necanicum” and swung towards the *court* of the “Beaver” only after said “Beaver” had ported her helm instead of starboarding her helm in response to the two whistles of the “Necanicum”; denies that thereupon the engine of the “Beaver” was reversed and put full speed astern, and alleges that it is ignorant whether the “Beaver’s” helm was put hard aport, wherefore it calls for proof of the same if the same be pertinent; alleges that it is ignorant as to whether simultaneously therewith the master of the “Beaver” gave three blasts of her whistle; denies that in the meantime and without responding, or

without responding, [18] to the said three blasts, said "Necanicum" continued to swing to port towards the said "Beaver," and denies that notwithstanding the reversing of the said "Beaver's" engine and the hard aporting of her helm, or at all, she was unable to avoid the said collision; denies that the "Necanicum" struck the said "Beaver" on the latter's port bow, at nearly right angles, or at all, and in that behalf alleges that the "Beaver," coming at a considerable rate of speed, struck the "Necanicum" on the "Necanicum's" bow, smashing the same in from below the water-line through to the full height of her bulwarks and by the force of the said collision disabling her steering gear; alleges that it is ignorant of the fog conditions experienced by the "Beaver" from prior to passing Point Arena up to twenty minutes of the said collision, wherefore it calls for proof of the same if the same be pertinent; admits that thereafter, at short intervals, a light drifting fog prevailed, and alleges that at other intervals a heavier fog prevailed; denies that during all of which time the officer or lookout, or either of them, or any of them, of the said "Beaver" could see a distance of from not less than two to ten miles, and in that behalf alleges that during much of the said time the officers and lookout could not see a distance of over a quarter of a mile and at times could not see a distance of one thousand feet; denies that during all of the times preceding the collision, or any of them, the automatic fog signal of the said "Beaver" was regularly blown; denies that during any of the said time a moderate speed was maintained by said "Beaver,"

as required by law, or at all.

III.

Answering article IV of said libel, denies that at all or any of the said times proper and competent officers were on watch and a proper and efficient lookout or such a lookout was [19] maintained on said "Beaver"; denies that said collision was not caused by any fault or neglect or either of them, in the navigation of the said "Beaver" as required by the International Rules of Navigation, or at all; denies that the collision was caused solely or at all by the careless and negligent navigation, or either of them, of the said "Necanicum," in that she did not have on watch proper and competent officers and did not, or did not, maintain a proper and efficient lookout, and did not, or did not, alter her course to starboard so as to pass the said "Beaver" to port, as required by the said passing signals, or at all, and that, or that, she did not stop and reverse, or either of them, on receiving the said signals of the said "Beaver"; and that, or that, she did not alter her course to starboard when danger of collision became imminent.

IV.

And for a separate defense to said libel claimant alleges that although the bow of the "Necanicum" was smashed in and her steering gear disabled by the said collision, as aforesaid, the steamer "Beaver" did not stay by the "Necanicum" until the master of the steamer ascertained that the "Necanicum" had no further need of assistance and to render to the other vessel, her master and crew, such assistance as may have been practicable and as may be necessary

in order to save them from any danger caused by the collision, or at all, but, despite the said injuries to said "Necanicum," he immediately steamed away at full speed, leaving the said "Necanicum" so disabled in the fog; that at the said time the said steamer "Beaver" could have stayed by the said steamer "Necanicum" without serious danger to said "Beaver," her crew and passengers, or any of them.

[20]

V.

Answering article V of said libel, claimant alleges that it is ignorant of all the allegations of said article, wherefore it calls for proof of the same if the same be pertinent.

VI.

Denies that all and singular the premises are true, save as hereinabove admitted.

WHEREFORE claimant prays that libelant take nothing by its libel on file herein and that the libel be dismissed, and that claimant recover judgment for its costs.

W. S. BURNETT,
WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Claimant.

State of California,
City and County of San Francisco,—ss.

W. S. Burnett, being first duly sworn, deposes and says:

That *he an* officer of claimant, to wit, vice-president; that he makes this verification for and on behalf of said claimant; that he has read the foregoing

answer and knows the contents thereof, and believes the same to be true.

W. S. BURNETT.

Subscribed and sworn to before me this 22d day of January, 1914.

[Seal] M. I. LAWRENCE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires January 27, 1914.

Due service and receipt of a copy of the within Answer is hereby admitted this 23d day of January, 1914.

IRA A. CAMPBELL,
McCUTCHEEN, OLNEY & WILLARD,
Proctors for Libellant.

[Endorsed]: Filed Jan. 23, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 15th day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,513.

SAN FRANCISCO AND PORTLAND S. S. CO.,
a Corporation,

vs.

Steam Schr. "NECANICUM," etc.

Minutes of Trial—October, 15, 1914.

This cause this day came on regularly for hearing, Ira A. Campbell, Esq., appearing as proctor for libelant, and Wm. Denman, Esq., as proctor for claimant. At request of both parties, the Court ordered that the cause entitled Leggett Steamship Company, a Corporation, vs. San Francisco and Portland Steamship Company, a Corporation, No. 15,675, be, and the same is hereby, consolidated with this cause for hearing.

Mr. Campbell and Mr. Denman stated their respective positions in these causes.

Thereupon Mr. Campbell called E. W. Mason, who was duly sworn and examined on behalf of libelant and introduced in evidence certain exhibits, which were filed and marked Libelant's Exhibits 1 (photograph), 2 (chart), and 3 (photograph).

Mr. Denman, during the examination of Mr. Mason, introduced in evidence a certain exhibit, which was filed and marked Claimant's Exhibit "A" (photograph).

Thereupon, the Court ordered that the further hearing of these causes, be, and the same is hereby, continued until October 16th, 1914, at 10 o'clock A. M.

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 16th day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,513.

SAN FRANCISCO AND PORTLAND S. S. CO.,
a Corporation,

vs.

Steam Schnr. "NECANICUM," etc.

Minutes of Trial—October 16, 1914.

The hearing of this cause, as consolidated with cause No. 15,675, this day was resumed. Ira A. Campbell, Esq., appearing for libelant, and Wm. Denman, Esq., appearing for respondent. W. E. Mason resumed the stand on behalf of libelant and was further examined. Mr. Campbell then called Joseph W. Ettershank, K. Townsend, C. F. Parker and Walter Bryning, who were each duly sworn and examined on behalf of libelant. Mr. Campbell then introduced in evidence certain exhibits, which were filed and marked Libelant's Exhibits 4 (photograph), 5 and 6 (drawings). Mr. Denman then called J. F. Clemens, who was duly sworn and examined on behalf of respondent, and introduced in evidence certain exhibits, which were filed and

marked Claimant's Exhibits "B" (log), "C," "D," "E," "F," and "G" (photographs). Thereupon, the Court ordered that the further hearing of this cause be, and the same is hereby, continued until October 20th, 1914, at 10 o'clock A. M. [23]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 20th day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,513.

SAN FRANCISCO & PORTLAND S. S. CO.,
a Corporation,

vs.

Steam Schnr. "NECANICUM," etc.

Minutes of Trial—October 20, 1914.

This cause, as consolidated with cause No. 15,675, this day came on regularly for further hearing. Ira A. Campbell, Esq., appearing as proctor for libelant and Wm. Denman, Esq., as proctor for respondents. Mr. Campbell called George Roffler and David W. Dickie, who were each duly sworn and examined on behalf of libelant. Thereupon, on motion of Mr. Campbell, the deposition of Theodore J. Hewitt was opened, filed and introduced in evidence.

Mr. Campbell then called Frank H. Evers, who was duly sworn and examined on behalf of libelant, and introduced in evidence certain exhibits, which were filed and marked Libelant's Exhibits 7 (photograph), 8 (drawing), 9, 10 (blue-prints), and 11 (log-book), and thereupon rested the cause of libelant.

Mr. Denman then called Christian Emanuelson and W. Pendergast, who were each duly sworn and examined on behalf of claimant and introduced in evidence certain exhibits, which were filed and marked Claimant's Exhibit "H" (report), and "I" (drawing).

Thereupon, the hour of adjournment having arrived, the Court further ordered that the hearing of this cause continued until October 21st, 1914, at 10 o'clock A. M. [24]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 21st day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,513.

SAN FRANCISCO & PORTLAND S. S. CO.,
a Corporation,

vs.

Steam Schnr. "NECANICUM," etc.

Minutes of Trial—October 21, 1914.

This cause, as consolidated with cause No. 15,675, this day came on regularly for further hearing. Ira A. Campbell, Esq., appearing for libelant and Wm. Denman, Esq., for respondent. Mr. Denman called E. G. Clough, Charles Ottenhause, G. W. Slater, Peter Christensen, Edward S. Hough and John H. Pinder, who were each duly sworn and examined on behalf of respondent, and introduced in evidence certain exhibits, which were filed and marked Claimant's Exhibits "J" (photograph), "K" and "L" (drawings).

Mr. Campbell introduced in evidence certain exhibits, which were filed and marked Libelant's Exhibits 12 (log), 13, 14 and 16 (drawings).

Thereupon, the hour of adjournment having arrived, the Court ordered *that* the further hearing of this cause continued until October 22d, 1914, at 3 o'clock P. M. [25]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 22d day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,513.

SAN FRANCISCO & PORTLAND S. S. CO.,
a Corporation,

vs.

Steam Schnr. "NECANICUM," etc.

Minutes of Trial—October 22, 1914.

The hearing of this cause, as consolidated with cause No. 15,675, this day came on regularly for further hearing. Ira A. Campbell, Esq., appearing for libelant and Wm. Denman, Esq., for respondent. Mr. Denman called G. Peterson, R. B. Seike and A. T. Jones, who were each duly sworn and examined on behalf of claimant and introduced in evidence the depositions of Walter N. Beckwith, George A. Olsen and Austin Keegan (one volume), and recalled Peter Christensen for further examination and thereupon rested.

Mr. Campbell then called H. W. Deans, who was duly sworn and examined on behalf of libelant and introduced in evidence the deposition of Alfred F. Pillsbury and certain exhibits, which were filed and marked Libelant's Exhibits 16 (affidavit), 17 (compass guide), and 18 (memo), and rested.

Thereupon, by consent of all parties, this cause was submitted to the Court on Briefs to be filed.

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 19th day of August, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,513.

SAN FRANCISCO & PORTLAND S. S. COMPANY

vs.

Stm. Sch. "NECANICUM," etc.

Minutes of Trial—August 19, 1915.

This cause, as heretofore consolidated with the cause entitled "Leggett S. S. Co., a Corporation, vs. San Francisco & Portland S. S. Co.," and numbered 15,675, came on regularly this day for argument as to the issues herein and testimony taken. Thereupon, after hearing Ira A. Campbell, Esq., proctor for libelants, and Wm. A. Denman, Esq., proctor for respondents, the Court ordered said matter submitted. [27]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libelant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boats, Tackle, Apparel and Furniture,

Respondent.

**Depositions of Walter N. Beckwith et al., Taken
Before U. S. Commissioner Krull.**

BE IT REMEMBERED that on Friday, April 17th, Tuesday, April 28th, Monday, May 11th, and Tuesday, May 12th, 1914, pursuant to the stipulation hereunto annexed, at the offices of Messrs. Denman & Arnold, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, duly commissioned to take acknowledgments of bail and affidavits, etc., Walter N. Beckwith, John T. Gannan, George A. Olsen and Austin Keegan, witnesses on behalf of the respondent.

Ira A. Campbell, Esq., appeared as proctor for the libelant, and William Denman, Esq., appeared as

proctor for the respondent, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did [28] thereupon depose and say as is hereinafter set forth:

(It is hereby stipulated and agreed by and between the proctors for the respective parties, that the deposition of Walter N. Beckwith, John T. Gan-
nan, George A. Olsen, and Austin Keegan may be taken *de bene esse* on behalf of the respondent, at the office of Messrs. Denman & Arnold, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, on Friday, April 17th, Tuesday, April 28th, Monday, May 11th, and Tuesday, May 12th, 1914, before Francis Krull, United States Commissioner for the Northern District of California, and in shorthand by Herbert Bennett.

It is further stipulated that the depositions when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of the taking said depositions, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.) [29]

Deposition of Walter N. Beckwith, for Claimant.

WALTER N. BECKWITH, called for the claimant, sworn.

Mr. DENMAN.—Q. Mr. Beckwith, what is your occupation? A. Master mariner.

Q. How long have you been a master mariner?

A. At intervals along the past 13 years.

Q. How old are you now? A. 33.

Q. What ship are you on?

A. The steamer “Necanicum” as mate.

Q. Were you on the steamer “Necanicum” in the month of October, 1913? A. Yes, sir.

Q. On the 30th of that month? A. Yes, sir.

Q. What position did you have on the “Necanicum” on the 30th of October? A. First mate.

Q. That was on the day of the collision with the “Beaver”? A. Yes, sir.

Q. What was the condition of the weather?

A. Passing fogs.

Q. First, let me ask you something about the “Necanicum,” what type of vessel is she?

A. Wooden steam schooner of a late pattern.

Q. How long is she?

A. 175, 176 feet, something like that; between 170 and 180 feet.

Q. And about what is her beam?

A. I should judge about 35 or 40 feet.

Q. And about what does she draw?

A. Maximum or minimum?

Q. Give both of them?

A. About four feet forward light, and about 16

(Deposition of Walter N. Beckwith.)

feet aft; loaded she will draw 16 to 18 feet, 18 feet aft.

Mr. CAMPBELL.—Q. How much will she draw aft when light? [30] A. About 16 feet.

Q. And loaded 16 to 18 feet?

A. 18 feet to 19 feet.

Mr. DENMAN.—Q. What was she drawing on this day?

A. I should judge about 16 and four; I have no way of telling, only from information on previous trips.

Q. Based on your experience with her?

A. Yes, sir, my familiarity with her.

Q. Where had you come from? A. San Pedro.

Q. Where were you bound? A. Eureka.

Q. I am speaking now of the afternoon of the collision? A. Yes, sir, Eureka.

Q. About what time in the afternoon did you first see—where were you from one o'clock until three o'clock on that day?

A. At the time of the collision we were to the northward of Point Reyes.

Q. Where were you personally between one and three o'clock on that day?

A. I took the bridge at half-past 12 and was relieved from duty at six o'clock.

Q. And during the time the collision occurred?

A. Yes, sir.

Q. Where did you first see the "Beaver"?

A. On our starboard bow seven or eight miles away.

(Deposition of Walter N. Beckwith.)

Q. At about what time was this?

A. Shortly before two o'clock, I should judge 1:55; something like that, or say 1:50.

Q. How long did you continue to see her?

A. Several minutes.

Q. What happened then?

A. In the meantime I was relieved at two o'clock, four bells struck and a small fog bank set in between us, between the approaching ship and ourselves.

Q. How was the fog condition about your vessel, heavy or light?

A. Light, just banks passing. [31]

Q. Did you get any fog whistles from her?

A. No, sir, heard none.

Q. When did you next see her?

A. Two or three minutes previous to the collision.

Q. Where was she when she came in sight?

A. She was on the starboard bow, her bearing had widened.

Q. What, if any, orders did you give at that time?

A. At the time I seen her?

Q. Yes? A. I starboarded my helm.

Q. What did you say?

A. Starboard your helm, and sounded two blasts of the steam whistle denoting my intention of passing him on his starboard side.

Q. Whereabouts on the bridge were you at this time? A. Both sides.

Q. Walking back and forth?

A. Backwards and forwards; yes, sir.

(Deposition of Walter N. Beckwith.)

Q. Did you get any response from him?

A. The response was not discernible to the ear.

Q. Did you see anything from him?

A. I seen evidence of steam or something from his whistle, I do not know what it was, making no sound.

Q. How many blasts as far as indicated by sight?

A. I could not tell, I surmised it was one.

Q. What happened?

A. As he altered his course denoting he was crossing our bow, or attempting to, the captain signalled for full speed astern, sounding three blasts denoting her engines were going astern full speed.

Q. Did he give any other order at this time?

A. The captain?

Q. Yes?

A. Not to my knowledge; I was busily engaged
[32] otherwise.

Q. Did he give any order to the helmsman, the man at the wheel?

A. I could not swear to what was said or passed between them. My time was taken up otherwise.

Q. What did you do?

A. Called the second mate out; instructed the men to assist the second mate in taking the log in; called the sailors out of the fore-castle, got the watch out; also got the men out of the life-boat who were repairing the life-boat, washing and painting.

Q. How readily does your vessel answer the helm?

A. As the average steam schooner of her type.

Q. Tell me what has she got, a right-hand or left-hand propeller. A. Right-hand propeller.

(Deposition of Walter N. Beckwith.)

Q. What is the effect on her course when you give full speed astern and as you continue ahead through the water with diminishing speed?

A. When a vessel gathers sternway with a right-hand propeller it draws her stern to port.

Q. As you are going ahead before you stop does your head turn to starboard or port?

A. It would be with the helm, the helm would control that.

Q. Suppose the helm was straight ahead which way would the engine throw you, or do you know—have you ever tried it?

A. No, sir, I cannot answer that question authentically; I have an opinion, but it might be very much out.

Q. Had you succeeded in reducing your speed between the time that the order full speed astern was given and the collision?

A. Yes, sir; rapidly astern, the vessel was going rapidly astern.

Q. You mean by that you had sternway at the time of the collision? A. Yes, sir. [33]

Q. What can you say as to the speed of the "Beaver" at the moment of impact?

A. She was going at a rapid rate of speed; I should think from about six to eight knots an hour ahead.

Q. How could you tell that?

A. That is merely estimation from the force of the impact, the jar of the collision; also by the foam that was thrown up from the bow's spray.

(Deposition of Walter N. Beckwith.)

Q. Did she stop at any time? A. No, sir.

Q. What happened immediately after the collision?

A. She passed on having full speed; she was out of sight in a few minutes, a couple or three minutes.

Q. What did you do?

A. Ascertained the damage done to our vessel and the captain turned around and proceeded for San Francisco.

Q. Did the "Beaver" at any time come back?

A. No, sir.

Q. Did you examine the injuries to the bow of the "Necanicum"? A. Yes, sir.

Q. What were the injuries to the bow?

A. The stem was demolished, hawser-pipe crushed and anchor bent and driven into the wood, port anchor.

Q. Her port anchor?

A. Yes, sir; port hawser-pipe was crushed.

Q. On which side of the bow did the crushing occur?

A. The most damage was done stem, done to port; port hawser-pipe crushed and anchor bent.

Q. That is port anchor? A. Yes, sir.

Q. You have patent anchors, have you?

A. Yes, sir.

Q. And that anchor protrudes from the port, does it not? A. Yes, sir; from the hawser-pipe.

Q. Could you tell what portion or which side of the hawser-pipe [34] was injured, the aft or forward side? A. All sides.

(Deposition of Walter N. Beckwith.)

Q. Could you tell where the crushing strength had been applied?

A. Aft, the anchor was shoved aft, decidedly aft.

Q. Was there any injury to the starboard anchor?

A. No, sir.

Q. Any scratches on the starboard side?

A. No, sir.

Q. At what angle do you think the two vessels came together? A. Between 33 and 48 degrees.

Q. What lookout did you have, if any, on the vessel?

A. I had a sailor stationed on the forecastle-head at the time the fog first put in an appearance.

Q. About 20 minutes before the collision?

A. Yes, sir, more than 20; all of 20.

Q. Who was he? A. Chris Emanulsen.

Q. A competent man?

A. Very competent man.

Q. When you sent him out there you had already seen the "Beaver"? A. Yes, sir.

Q. Where was he when the "Beaver" came into sight? A. The first or second time?

Q. The second time? A. On the lookout.

Q. What happened then?

A. He reported her approaching on the starboard side sounding no blasts of his fog whistle.

Q. Are you going to sea to-morrow?

A. I believe so.

Q. On the "Necanicum"? A. I believe so.

Mr. DENMAN.—That is all.

(Deposition of Walter N. Beckwith.)

Cross-examination.

Mr. CAMPBELL.—Q. Have you the “Necanicum’s” bridge log? A. No, sir.

Q. Where is it? A. Aboard the ship.

Mr. CAMPBELL.—I would like to have it produced. I will [35] have to ask for a continuation of the examination until it is produced.

Q. Did you make any report to the Inspectors?

A. I did.

Q. Did you keep a copy of it?

A. I kept it in my mind.

Q. Did you keep a written copy of it?

A. No, sir.

Q. In what form was it made, in handwriting or typewritten? A. Handwriting.

Q. Did you furnish a copy to your owners?

A. No, sir; I furnished one report to the owners and one report to the Inspectors.

Q. Did you furnish a copy to the owners?

A. Not a copy, but a statement.

Q. It was the same—they were the same to both parties?

A. The same; the substance was the same.

Mr. CAMPBELL.—I would like to have that produced before the examination is continued.

Q. What time of day was it when the collision took place?

A. Between 2:15 and 2:20; about 2:18.

Q. In the afternoon? A. P. M.

Q. Whereabout was it?

(Deposition of Walter N. Beckwith.)

A. Between 30 and 40 miles northwest of Point Reyes.

Q. Where was—

Mr. CAMPBELL.—Can't we send down for that bridge log right away?

The WITNESS.—You might get it, they have the official log, but the mate's book—they have the official log at Hammond's office.

Mr. DENMAN.—He wants the bridge log.

Mr. CAMPBELL.—Q. Where is the schooner now, up the river? A. Yes, sir. [36]

Q. What was the course of your vessel?

A. Magnetic or true or compass?

Q. Your standard compass?

A. Northwest half west.

Q. From where did you take that bearing?

A. We altered the course at Point Reyes; Point Reyes was abeam.

Q. What is your deviation?

A. The standard compass, magnetic and wheel-house compass one-quarter westerly.

Q. Is there not a deviation on your standard compass? A. Not when it is magnetic.

Q. Not on that course, on that run? A. No, sir.

Q. Have you any deviation on your standard compass up and down the coast?

A. On our easterly course only.

Q. On your easterly courses? A. Yes, sir.

Q. How far off Point Reyes did you pass?

A. I was not on deck when we passed Point Reyes.

Q. Do you know what the log-book shows on that?

(Deposition of Walter N. Beckwith.)

A. Two miles about.

Q. Is your ship equipped with a polaris?

A. Yes, sir, an improved polaris.

Q. Do you know how the distance off Point Reyes was ascertained?

A. By soundings, I believe; I was not present, though.

Q. Do you ascertain it by a four-point bearing?

A. In clear weather.

Q. Was it clear weather when you passed Point Reyes? A. No, sir.

Q. What was it? A. Passing fogs.

Q. Where were you at that time?

A. In my bunk asleep.

Q. So the distance off Point Reyes was purely estimated from soundings? A. Yes, sir.

Q. About what time was it you passed Point Reyes?

A. I do [37] not know; I cannot recollect it to memory now; the log-book will show.

Q. Where would be the next change of your course? A. Point Arena.

Q. How far below Point Arena were you at the time of the collision? A. 25 miles, I should judge.

Q. Who was the man that rushed on the bridge in his shirt sleeves before the collision? A. No one.

Q. Who was the man on the bridge in shirt sleeves? A. Me.

Q. Didn't you come from the lower deck to the bridge in your shirt sleeves? A. At 12:30?

Q. Just before the collision.

(Deposition of Walter N. Beckwith.)

A. At 12:30; after two o'clock the collision occurred.

Q. Didn't you do it just before the collision?

A. No, sir.

Q. Had you been on the bridge all the time up to the collision? A. Yes, sir.

Q. Was it usual for you to stand your watch in shirt sleeves then?

A. Yes, sir; when you have an accident and have your coat burned up, it is. It was burned up.

Q. What do you mean by having your coat burned up?

A. In the steamer I was in previous to the "Necanicum" I put my coat on the fiddley to dry, and the fireman got a roaring fire started and my working coat went up in smoke.

Q. How long have you been on the "Necanicum" this time? A. Since July 5th.

Q. And you had no working coat on her?

A. No, sir; I have not yet.

Q. And you stood all your watches in shirt sleeves?

A. Sweater, oil skins, and coat once in a while, service coat, go-ashore coat. [38]

Q. That was the reason you were standing watch this day in shirt sleeves because you lost your coat?

A. I am not in the habit of wearing a coat in working hours.

Q. Did you lose your cap in the fire also?

A. No, sir.

Q. Did you have it on this day?

(Deposition of Walter N. Beckwith.)

A. Yes, sir, I had a cap on.

Q. Are you sure you were not bare-headed?

A. No, sir; I was not bare-headed.

Q. Where was the master at the time of the collision? A. On the bridge.

Q. How long had he been on the bridge before the collision?

A. At the time the passing signals were blown,—he was either on the bridge or approaching the bridge as the passing signals were given.

Q. Did you send for him?

A. I had no time; he had only left there a very few minutes before sighting the vessel; he had been up there nearly all the time from the time I went on the bridge.

Q. Why was he there nearly all the time?

A. I guess that is his business; he believed that was his place.

Q. Is that true of steam schooners that the master is on the bridge nearly all the time?

A. In foggy weather, yes, sir; bad weather.

Q. That was the reason he was on the bridge, was it? A. Yes, sir.

Q. You first sighted the "Beaver" on your starboard bow?

A. At all times the "Beaver" was on our starboard bow until after the collision.

Q. I say you first saw her on your starboard bow?

A. Yes, sir.

Q. And you judged her to be seven or eight miles away? [39] A. Yes, sir.

(Deposition of Walter N. Beckwith.)

Q. Could there be any mistake as to whether or not it was the "Beaver"?

A. Right after the collision I read her name.

Q. So you are sure it was the "Beaver" that you saw seven or eight miles away?

A. Yes, sir, by bearings and observation.

Q. How far would it have passed you to your starboard if neither vessel had altered its course?

A. She should have passed in the vicinity of a mile off.

Q. A mile off to your starboard? A. Yes, sir.

Q. How did she appear when you first sighted her?

A. Twelve to fifteen degrees on our starboard bow.

Q. Seven or eight miles away? A. Yes, sir.

Q. What time was that you first sighted her?

A. Shortly before two o'clock.

Q. And the collision took place what time?

A. Between 2:15 and 2:20.

Q. And you say you never at any time heard any fog signals from the "Beaver"? A. No, sir.

Q. Why didn't you?

A. I don't think they were sounded.

Q. Whereabouts is your bridge on your steamer?

A. It is a little abaft of the amidships.

Q. In the stern? A. Yes, sir.

Q. The machinery is in her stern? A. Yes, sir.

Q. Is she fitted for carrying passengers?

A. No, sir.

Q. Small cabin? A. Yes, sir.

Q. Why is the bridge hot?

(Deposition of Walter N. Beckwith.)

A. The engine-room was directly beneath that house; engine-room, fire-room, galley.

Q. Boiler on deck? A. Boiler below decks.

Q. Below decks? A. Yes, sir. [40]

Q. How far is your smokestack abaft your bridge?

A. Four or five feet.

Q. That is what makes the bridge so warm?

A. That is the closest part of the smokestack.

Q. That is what makes the bridge so warm?

A. That and the engine-room and the fire-room beneath; it is like that in all steam schooners of that type.

Q. What is there around the smokestack where it comes through the roof of the cabin?

A. An umbrella.

Q. What is it? A. Iron casing.

Q. What do you call that? A. Umbrella.

Q. What is there around the cabin itself; how is the roof of the cabin—

A. (Intg.) The cabin is a wooden structure.

Q. Is it fitted with grating around it?

A. Inside below the bridge deck.

Q. Below the bridge deck? A. Yes, sir.

Q. Can you hear the oil burners from the bridge?

A. Well, the same as on all vessels of the type of that vessel.

Q. You can hear them, can't you? A. Slightly.

Q. More than slightly, can't you?

A. Like all vessels of that type.

Q. Like all steam schooners?

A. Schooners all of that type.

(Deposition of Walter N. Beckwith.)

Q. Is your ship any different than any other type?

A. There are half a dozen different types of steam schooners; some of them have the machinery away aft, and the bridge away forward; others have the machinery amidships and the bridge aft or forward; some of them have it forward.

Q. What steam schooner on the coast has her machinery amidships [41] and her bridge away aft? A. Not away aft.

Q. Give me the name of one of them now?

A. The "Cricket" has her bridge abaft of the machinery, I think; I think the "Rochello."

Q. The "Cricket" has her boiler in the extreme end of her?

A. The bridge is in the extreme end aft.

Q. The boiler is in the extreme end?

A. I do not know; I said the machinery.

Q. You answer my question. A. I don't know.

Q. You do not know that her smokestack comes up very close to her stern? A. Yes, sir.

Q. And you know it is also true with the "Rochello"? A. Yes, sir.

Q. You know her boilers are on deck and turned around?

A. I do not know that. Is not her machinery on the fore part?

Q. Forward of her boilers? A. Yes, sir.

Q. And the bridge forward of her machinery?

A. I do not think so.

Q. Have you ever been aboard of her?

A. No, sir.

(Deposition of Walter N. Beckwith.)

Q. They are unique types of vessels, are they not?

A. The "Rochello" and the "Cricket"?

Q. Yes. A. Yes, sir.

Q. Now, standing on your bridge you are directly over the boilers, are you not?

A. Almost; there is an intervening space between those several decks.

Q. Where is the smokestack on your vessel, does it come up in the forward end or after end?

A. I believe it comes up in the after end, I am not sure.

Q. If your bridge is within four or five feet of the smokestack your bridge is over your boilers.

A. Probably. [42]

Q. Is it not true?

A. I cannot tell; I have not looked into it.

Q. Now, when those burners are going there is considerable roar from them? A. Some.

Q. Not some; is there not considerable roar?

A. On some vessels, yes.

Q. Is there not on the "Necanicum"?

A. Not noticeably more than others.

Q. Is it not the same on that steam schooner as on other steam schooners in that respect?

A. Not as much as on some others.

Q. Why not?

A. There are various kinds of burners.

Q. Is it not true when you are standing on the bridge there is a roar that comes from those burners?

A. There is more or less in all vessels; also on the "Beaver" there is a roar.

(Deposition of [Walter N. Beckwith].)

Q. And to hear well from your bridge you have got to go to the railing of the bridge?

A. We adopt that precaution.

Q. Is not that the reason you do it?

A. Yes, sir.

Q. To get away from the roar of the burners?

A. Yes, sir; not only the burners but the machinery.

Q. It is difficult to hear from the bridge when the burners are going, is it not?

A. Well, it is on all vessels more or less, a little difficult to hear.

Q. That is, on these steam schooners particularly?

A. On all vessels.

Q. On steam schooners particularly?

A. No, sir, not steam schooners particularly; all vessels that have oil burners.

Q. The nearer your bridge is to the smokestack the louder the roar, is it not?

A. It depends on the equipment.

Q. Is not that true on those steam schooners?

A. Some of them. [43]

Q. Is it not true on the "Necanicum"?

A. Yes, sir; in the vicinity of the—if you poke your head down underneath the umbrella you can hear the roar.

Q. Standing on your bridge, don't you hear the roar from your burners?

A. There is very little difference between them and the "Beaver."

Q. Have you ever been on the "Beaver"?

(Deposition of Walter N. Beckwith.)

A. I walked aboard her and off.

Q. Did you hear any roar? A. Yes, sir.

Q. On the bridge? A. No, sir.

Q. Where? A. On the forward deck.

Q. Here in port? A. Yes, sir.

Q. Lying still? A. Yes, sir.

Q. And you heard the roar of her main boilers going?

A. Not the main boilers, the donkey boilers. I did not say main boilers.

Q. Any way, on the "Necanicum" you have got to go to the wings of your bridge to hear?

A. Not necessarily.

Q. To get away from the roar of the burners you have got to go to the wings of the bridge, have you not?

A. Not necessarily; a vessel with a loud whistle can be heard at reasonable distance any place on deck.

Q. Don't you go to the wings to get away from the oil burners? A. We do that as a precaution.

Q. Don't you do it for that purpose on the "Necanicum"?

A. Not altogether, but to get out in the clear away from the masts, winches and other implements.

Q. Is it not a fact, Mr. Beckwith, that those oil burners on the "Necanicum" make such a loud noise when they are going it makes it difficult to hear on the bridge of the "Necanicum"? [44]

A. Not any more so than on other vessels of her type.

Q. I am not asking you about other vessels; I say

(Deposition of Walter N. Beckwith.)

it is not a fact on that vessel? A. I can hear them.

Q. Don't they interfere with your hearing of sounds? A. To a small extent.

Q. You say you never heard a fog whistle from the "Beaver"? A. No, sir.

Q. Your lookout did not report you one?

A. The lookout, when he went forward, said he could not hear anything, but seen her.

Q. And you sent a lookout to the fore-castle-head when you saw the "Beaver"?

A. When the fog threatened to set in I sent the lookout.

Q. To the fore-castle-head? A. Yes, sir.

Q. What does the law require in regard to maintaining a lookout?

A. A lookout from sunset until sunrise, also in thick and foggy weather at all times in the forward part of the ship.

Q. Is that all?

A. At the forward part of the ship; when he hears signals of passing ships to report them.

Q. Don't the law require you to maintain a lookout forward at all times? A. No, sir.

Q. It does not?

A. Only between sunset and sunrise and in foggy and thick weather.

Q. You were the one who sent the lookout to the fore-castle-head? A. Yes, sir.

Q. And you did that after you came on watch?

A. Yes, sir.

Q. There was no lookout on the fore-castle-head

(Deposition of Walter N. Beckwith.)

when you passed Point Reyes?

A. I don't know; I was not on watch; I was in my berth. [45]

Q. Did you send him on when you took your watch or when you saw the "Beaver"?

A. At all times during the time.

Q. At various times during the time?

A. At all times.

Q. You pulled him off and put him back and pulled him off and put him back again as the fog came in and went?

A. At first when I came on the bridge it was extremely clear, I could see 10, 12 or 15 miles.

Q. You had no lookout?

A. No, sir; not when I could see 15 miles.

Q. Then you put the lookout on when the fog came in? A. When I saw evidences of fog.

Q. Then you pulled him off again? A. No, sir.

Q. Was he on there at all times after you first put him on? A. Yes, sir.

Q. Didn't the fog come and go?

A. It was threatening.

Q. Threatening? A. Yes, sir.

Q. Had it not been threatening at Point Reyes?

A. I don't know; I was not on the bridge at Point Reyes.

Q. There was no lookout on when you came on?

A. It was clear weather.

Q. What was this lookout doing when he was not on the lookout?

(Deposition of Walter N. Beckwith.)

A. This man who was on the lookout was at the wheel from 12 to 2.

Q. And you sent him from the wheel to the lookout?

A. Shortly after he left the wheel.

Q. That was after two o'clock? A. Yes, sir.

Q. And you went on watch at 12 o'clock?

A. 12:30.

Q. Who was on the lookout from 12:30 to 2 o'clock? A. The other man.

Q. Who was there? A. I don't remember. [46]

Q. Why?

A. I don't know for sure; there was passing fog; I think a man was there.

Q. Do you remember anything about it?

A. I cannot say; but we could see shortly before two o'clock, we could see 15 miles and sighted the other steamer.

Q. You are uncertain whether you had a lookout up to two o'clock? A. I had at times.

Q. At times?

A. Yes, sir; but I did not have him constantly there during clear weather.

Q. As the fog came, you put him on, and as the fog went away you pulled him off?

A. Before the fog came.

Q. As you saw it come? A. What was that?

Q. As you saw it coming up?

A. A long ways off.

Q. After it passed you pulled him off?

A. After it passed the "Beaver" came along.

Q. Between 12:30 and 2 o'clock you say you do not

(Deposition of Walter N. Beckwith.)

know whether you had a man on the lookout in one breath and in the next breath you say you put him on again when it got foggy? A. Yes, sir.

Q. Was this the same man you put on at 2 o'clock or some other man? A. No, sir.

Q. Don't you know? A. Not his name.

Q. Why can't you remember it as well as Emanulsen? A. I had no occasion to.

Q. What makes you remember putting on Emanulsen at 2 o'clock?

A. He left the wheel at five minutes after two, and I sent him on the lookout.

Q. What became of the man on the fore-castle-head from 12 to 2? A. What was that question?

Q. Who took the lookout after Emanulsen left it? [47] A. Christenson.

Q. Where had he been?

A. Various places around deck.

Q. From 12 to 2? A. Yes, sir.

Q. What became of the man on the lookout from 12 to 2; what became of him after 2 o'clock?

A. He had various duties around the deck.

Q. Who was it? A. I don't know.

Q. How do you know he was doing various duties around deck?

A. I usually keep them all busy when it is my watch on deck.

Q. Yet you don't know who it was?

A. There are eight sailors there.

Q. You don't know who it was?

A. No, sir; I cannot recall it to memory; there is

(Deposition of Walter N. Beckwith.)

nothing to cause me to remember it.

Q. Do you remember sending any man to the lookout at 12 o'clock? A. I don't remember.

Q. Do you remember sending any man to the lookout between 12 and 2?

A. I believe there was a man sent there; I cannot say for sure. During the foggy weather there was a man there.

Q. Why do you say you cannot remember. Is it customary for you to do that, or that you remember it?

A. Always in foggy weather I do that at all times, during the fog or threatening fog there is always a man on the lookout.

Q. Because the law requires it you do it?

A. For my own safety and the sailors as well.

Q. You had a man on the lookout sometimes between 12 and 2 o'clock because the law required it?

A. On account of the law?

Q. Because the law required you?

A. No, sir; to report other vessels approaching.

Q. Do you recall whether that man was on there constantly? [48] A. No, sir.

Q. As a matter of fact, you cannot recall anything about it?

A. I cannot recall who it was by name; he was there.

Q. You cannot ever recall there was fog between 12 and 2? A. Yes, sir; there was fog.

Q. Can you recall having sent a man there?

A. I cannot state who it was; I know there was fog

(Deposition of Walter N. Beckwith.)

and there must have been a man there. There was a man there; who he was I don't know.

Q. After you saw the "Beaver" seven or eight miles away, about 15 degrees on your starboard bow, so that she would pass you a mile off, as I understand you to say? A. Yes, sir.

Q. How long did you see her?

A. Several minutes.

Q. How many minutes? A. Three or four.

Q. Three or four minutes? A. Yes, sir.

Q. How long was it that she was shut out by the fog?

A. Oh, from shortly after 2 o'clock until the collision occurred—shortly before, about two or three minutes before the collision occurred.

Q. At that time where was she?

A. She was coming down the coast; had she proceeded on her course she should have been about a mile or so inside.

Q. Where was she at the time you saw her at 2:15, or three minutes before the collision?

A. On our starboard bow.

Q. Whereabouts was she on your starboard bow?

A. I should judge between three and four points; about three.

Q. How many degrees, about?

A. There are 11 and a quarter degrees to a point.

Q. That was two or three minutes before the collision? A. Yes, sir. [49]

Q. How far distant was she?

A. Oh, in the vicinity of three-quarters or a mile.

(Deposition of Walter N. Beckwith.)

Q. How far off your starboard bow would that make her? A. I can figure it out by—

Q. What is your judgment?

A. Had she proceeded on her course she would have passed three-quarters of a mile.

Q. That is the time you first saw her?

A. No, sir.

Q. At the time you saw her two and a half or three points before the collision, how far off was she?

A. Do you mean in miles or feet?

Mr. DENMAN.—The question is confusing to the witness.

Mr. CAMPBELL.—Q. How far off was she from you at the time you saw her two and a half or three minutes before the collision when she was three points on your starboard bow?

A. Three-quarters to one mile.

Q. Three-quarters to one mile? A. Yes, sir.

Q. At that time you say her bearing had widened?

A. Yes, sir.

Q. How much? A. From 15 to 33 degrees.

Q. How far ahead of you *did judge* her to be at that time? At the time—*what* what time?

Q. Three minutes before the collision when you saw her three points?

A. She would be three-quarters of a mile.

Q. How far off to one side?

A. Between one-half and three-quarters of a mile.

Q. At that time you blew, as I understand your testimony, two blasts? A. Yes, sir.

Q. She was in plain sight of you? A. Yes, sir.

(Deposition of Walter N. Beckwith.)

Q. Had she changed her course up to the time you blew two blasts? A. No, sir; not visible to me.

Q. From that time she was coming nearer?

A. Yes, sir. [50]

Q. And you were pacing the bridge all this time?

A. Yes, sir.

Q. Up to the time of the collision? A. Yes, sir.

Q. Did you stay on there from the time you blew your two blasts up to the time of the collision?

A. No, sir.

Q. What did you do then?

A. Called out the sailors from below; called the second mate and instructed him to take in the log and called the men out of the life-boats.

Q. Where were the life-boats?

A. One on each side of the bridge at the extreme wings.

Q. Did you leave the bridge to do that?

A. When the captain came, yes.

Q. Did you leave the bridge to do that?

A. You understand what the bridge is there, the whole deck is the bridge; I never left the upper deck.

Q. Have you not got a regulation bridge on her?

A. The way the bridge extends—

Q. (Intg.) Is the floor of the bridge on a level with the cabin roof? A. The top of the house.

Q. Is the bridge enclosed? A. No, sir.

Q. Is the after part of it enclosed at all?

A. No, sir.

Q. The floor of the bridge is simply an extension of of the roof of the house?

(Deposition of Walter N. Beckwith.)

A. Yes, sir; with planks to walk on.

Q. Is the forward part of your bridge enclosed?

A. To about there, with canvas. (Illustrating.)

Q. How high? A. Here. (Indicating.)

Q. Three and a half feet? A. Yes, sir.

Q. With canvas? A. Yes, sir.

Q. Have the wings of the bridge canvas?

A. Yes, sir; that high. (Indicating.)

Q. The same height? A. Yes, sir. [51]

Q. Coming back the width of the bridge?

A. Yes, sir.

Q. And then the floor of the bridge is simply the top of the cabin extending back over the roof?

A. Yes, sir.

Q. And the smokestack is within four or five feet of the floor of the bridge?

A. It goes through the floor of the deck. The entire upper deck would be the bridge.

Q. Pacing back and forth across the floor you are within four or five feet of the smokestack?

A. Yes, sir.

Q. How high is that umbrella above the roof?

A. Between 20 and 26 inches, I should judge.

Q. How large in diameter is the smokestack?

A. I should judge about four and a half or five feet.

Q. How far does the umbrella extend up beyond it?

A. A square umbrella at the sides, I guess about 18 inches.

Q. Who blew the two blasts? A. I did.

Q. And up to that time the "Beaver" had not

(Deposition of Walter N. Beckwith.)

changed her course? A. No, sir.

Q. How soon after you blew the two blasts did you leave the bridge and call the men out of the life-boats? A. Half a minute or so.

Q. You had then heard no response from the "Beaver"?

A. I heard no response, but took it evidently that she sounded one whistle, because she altered her course sharply across the bow.

Q. Did you see that? A. Yes, sir.

Q. What did you do then?

A. Called the captain's attention to it.

Q. Where was he? A. On the bridge.

Q. Why did you have to call his attention to it?

A. It was my duty; he already seen it, but it was my duty. [52]

Q. What did you say to him?

A. I says, "What is he going to do; what the hell is he going to do?" I says?

Q. What did the captain do then?

A. Placed his hand on the telegraph and says, "My God! What is that man going to do?"

Q. What did he do then?

A. When we determined that the vessel was attempting to cross our bow he gave her full speed astern on the telegraph sounding three blasts of the whistle denoting the engines were going full speed astern.

Q. At the time the "Beaver" altered her course to starboard, did you give the danger signal?

A. She altered her course to port.

(Deposition of Walter N. Beckwith.)

Q. She altered her course to starboard?

A. That is port helm.

Q. Is that altering it to starboard?

A. The vessel goes to port.

Q. That is altering her course to starboard under a port helm? A. Yes, sir.

Q. Did you give the danger whistle?

A. Three whistles denoting we were going astern.

Q. At the time the "Beaver" was from one-half to three-quarters of a mile ahead of you?

A. Yes, sir.

Q. How soon after you saw the "Beaver" change her course did you leave the bridge?

A. I never left the bridge deck at any time until after the collision.

Q. You left what we call the bridge?

A. In the vicinity of the bridge I walked around it; also went aft and called the second mate by stamping on the roof of his cabin.

Q. At that time you could not see over the top of the bridge? A. Yes, sir.

Q. From where you were aft?

A. Yes, sir. [53]

Q. Why did you call the second mate at that time?

A. In case of an accident I would not let him drown.

Q. You thought there was going to be a collision?

A. I surely did, the way the other ship acted.

Q. What was done with the helm of your vessel?

A. Starboarded.

Q. Starboarded? A. Yes, sir.

(Deposition of Walter N. Beckwith.)

Q. And you swung off to port?

A. To port; yes, sir.

Mr. DENMAN.—At what time?

Mr. CAMPBELL.—Just a moment. I object to counsel interrupting the cross-examination at this point.

Mr. DENMAN.—What time of changing the helm are you referring to?

Mr. CAMPBELL.—I seriously object to counsel breaking in on the cross-examination; he knows it is not right.

Q. What time did you order your helm to starboard, when you blew your two blasts?

A. When I blew the two blasts.

Q. What was the order you gave?

A. Starboard your helm.

Q. Did the quartermaster do it? A. Yes, sir.

Q. What kind of steering gear have you got?

A. Rods, ropes and chain.

Q. What kind of a steering apparatus have you?

A. Wheel hand gear.

Q. Hand gear? A. Yes, sir.

Q. Did he alter his course?

A. At what time? Yes, he altered his helm.

Q. Did you alter the course of your vessel?

A. Must have altered it to some extent. The master was on the bridge at that time; I don't know what he did.

Q. Did you watch it?

A. No, sir; the captain was on the [54] bridge in command.

(Deposition of Walter N. Beckwith.)

Q. Who gave the order, did you? A. Yes, sir.

Q. Why didn't you watch it?

A. He put his helm to starboard; I had business other places.

Q. If you had continued swinging to port there would have been no collision, would there?

A. I don't know; the "Beaver" might have followed us right on up to Seattle.

Q. Would you have gone to Seattle if you had continued to swing to port?

A. We would have gone in a circle.

Q. There would have been no collision?

A. I do not know what the "Beaver" would have done.

Q. You did not continue to swing to port?

A. I do not know what occurred to the wheel after I left that part of the bridge.

Q. Did you order him to steady his helm after?

A. No, sir.

Q. Was the quartermaster situated so he could see the "Beaver"?

A. He should have been; I do not know; he should have been.

Q. When you ordered his helm to starboard, would he hold your vessel way off to port until you ordered him to steady it?

A. Yes, sir; I did not order him.

Q. I say, it would continue to swing off to port until it was ordered steady? A. It would; yes.

Q. If he continued to swing off to port there would have been no collision, in your judgment?

(Deposition of Walter N. Beckwith.)

A. I don't know what action the "Beaver" would have taken.

Q. Wouldn't you have swung far enough away to avoid a collision?

A. Had the "Beaver" proceeded on her course.

Q. If you had continued to swing to port wouldn't you continue swinging far enough to avoid a collision?

A. Not if the "Beaver" ran after us. [55]

Q. If the "Beaver" continued swinging to starboard under a port helm would not the two vessels separate? A. I cannot answer that.

Q. Your judgment is you did continue to swing to port under a starboard helm?

A. She had started to swing to port.

Q. When you left the bridge?

A. I did not leave the bridge when I took up other duties.

Q. You do not call the entire top of the cabin the bridge? A. That is the bridge deck.

Q. You are a seafaring man enough to know whether you call the entire top of the cabin the bridge?

A. The entire fore part. There are certain times a man has to do his duty on the bridge, he has to go away aft, forward, to the wings and amidship; all over.

Q. Don't you know there is a certain part of your vessel called the bridge? A. Yes, sir.

Q. How wide is that bridge?

A. Almost the width of the ship.

(Deposition of Walter N. Beckwith.)

Q. How long fore and aft?

A. About 40 feet.

Q. Then your smokestack comes right up through the bridge? A. Part of the bridge; yes.

Q. And the hood is part of the bridge?

A. The bridge deck. I don't know what the bridge is technically speaking on that ship. I know what it is as a sea-faring man, I do not know according to your version.

Q. You got the sailors out of the forecastle head?

A. No, sir.

Q. Where were they?

A. They were in the forecastle.

Q. That is underneath the forecastle-head?

A. Yes, sir.

Q. Did you call them? A. Yes, sir.

Q. Did you go to call him?

A. No, sir: I hollered. [56]

Q. What did you yell?

A. I told them to get the hell out of there, there was going to be trouble.

Q. Where were you at that time?

A. On the bridge deck.

Q. On the forward part of the bridge?

A. Yes, sir.

Q. Was that before you went to the aft part of it?

A. To call the second mate?

Q. Yes. A. I cannot say.

Q. Did you get back to the forward part of the bridge before the collision? A. Yes, sir.

(Deposition of Walter N. Beckwith.)

Q. Was your vessel still swinging under a star-board helm?

A. She was going astern; I did not notice.

Q. Was not she swinging at all?

A. She must have been swinging; I could not say.

Q. What way was she swinging?

A. Astern.

Q. What way will she swing when backing full speed with her helm starboarded?

A. Stern way to port with a right-hand wheel, stern way to port; naturally the bow has to take the opposite direction.

Q. Why did you say on your direct examination you could not tell?

A. You asked a different question. I say when the vessel is making sternway.

Q. Up to the time she is making sternway she will follow her helm? A. She should.

Q. All the time you are reversing your boat would be paying off to port?

A. The helm has nothing to do with the vessel backing, not that type of ship; the helm never changes in backing your vessel; not that type of ship.

Q. What did you mean by saying on your direct examination when your engine is reversed full speed astern that the ship will follow the helm up to the time she gains stern way? [57]

A. She will follow as long as you have headway; she follows the helm, but the minute she picks up sternway she turns first to port with a right-hand

(Deposition of Walter N. Beckwith.)

wheel. I never made a study of how long it takes a vessel to pay off to port or starboard in backing; that is, before sternway is picked up.

Q. Up to the time she picks up sternway and while she is still forging ahead and your propeller was reversed in your judgment she would follow the helm?

A. I do not know.

Q. Why did you say on direct examination she follows her helm?

Mr. DENMAN.—I submit he did not say that.

Mr. CAMPBELL.—Q. Why did you say on your direct examination the ship follows her helm up to the time she gains sternway?

A. I did not say that and you can go back and read my testimony.

(The Reporter thereupon reads the testimony of the witness.)

Q. What is your judgment, Mr. Beckwith, as to which way her head will swing if the helm is starboarded and you reverse your engines full speed, which way would her head swing while she is still going ahead? Won't she follow her helm?

A. I cannot answer that question.

Q. How long have you been on steam schooners?

A. 17 years.

Q. And yet you do not know?

A. I cannot answer authentically; different vessels would act different.

Q. Don't you know after 17 years what your vessel would do?

A. I have not been 17 years on the "Necanicum."

(Deposition of Walter N. Beckwith.)

Q. Don't you know what a vessel would do after 17 years experience?

A. I know when a vessel picks up sternway with a right-handed propeller she goes the other way; with a vessel going ahead with the propeller and helm she answers [58] when you alter the helm and when you change your propeller backing I don't know how she would go.

Q. You never have observed that on board steam schooners in 17 years experience?

A. I never had occasion to.

Q. You never reversed before at full speed astern when proceeding at sea? A. A few times.

Q. Did you observe which way she swung?

A. When she picked up stern way?

Q. Before she picked up stern way?

A. I did not observe.

Q. Then, if you continued ahead instead of reversing under your starboard helm you would have swung away from the "Beaver"?

A. The chances are I would not be here.

Q. You would have swung away from the "Beaver"?

A. The chances are she would have caught us amidships and sunk us; cut us in two if we had not backed.

Q. How long does it take to turn that vessel around in a circle?

A. I never turned her around in a circle; she will make eight knots an hour and the diameter of a circle should be possibly three-quarters of a mile.

(Deposition of Walter N. Beckwith.)

Q. How many points will she turn running full speed ahead in half a minute?

A. Under what conditions?

Q. The conditions you had there that day with her helm to starboard? A. In half a minute?

Q. Yes.

A. She should turn pretty nearly at right-angles; I cannot answer authentically.

Q. You have answered it to the best of your judgment?

A. Well, the conditions alter cases in steam schooners.

Q. Have you answered it to your best judgment?

A. I cannot tell.

Q. What is your best judgment about it, how far she would [59] turn in half a minute under a starboard helm? A. From 1 to 8 points.

Q. Nearer 8 than 1 in your judgment?

A. I do not know.

Q. You must have some idea if you have been 17 years on these vessels.

A. Yes, sir; I have seen steam schooners turn almost instantly and others I have seen go in several minutes.

Q. When will a vessel of that type turn quickest and easiest, when loaded or light?

A. Different conditions alter cases.

Q. What do you mean?

A. How much load; what the elements are; upon the wind, sea, current and tides.

Q. When a vessel is loaded she would be nearly

(Deposition of Walter N. Beckwith.)

on an even keel? A. No, sir.

Q. Two feet by the stern? A. Yes, sir.

Q. And this time she was four foot draft forward and 16 foot draft aft? A. In that vicinity.

Q. She would turn quickest under the conditions of weather, sea, current and tides that you had at this time prior to the collision?

A. Very little difference.

Q. Which way would she turn quickest, when loaded or light?

A. Very little difference; I do not know of any.

Q. Is it not a fact that vessels with their machinery aft and light forward will turn on their heels quicker light than loaded? A. In some cases.

Q. Is not that generally true on that type of vessel? A. No, sir.

Q. Is it not true with the "Necanicum"?

A. Weather conditions make changes.

Q. Taking the weather conditions as they were on that day, is it not true that that type of vessel with their machinery aft turn quicker light than loaded?

A. There is very little [60] if loaded properly.

Q. Now, you know from your own experience that they will turn quicker?

A. Take it if you know it. I do not know it. I do not know that, if you know that, all right.

Q. You say you could see the steam, but you could not hear the whistle? A. No, sir.

Q. What was the steam you saw, from her whistle? A. Apparently from her whistle.

(Deposition of Walter N. Beckwith.)

Q. Was her whistle in plain view?

A. The smokestack was visible and the whistle must have been there.

Q. The steam you saw coming from the whistle?

A. Yes, sir.

Q. How many blasts of steam did you see?

A. Several; I surmise he intended to blow one whistle by the fact he was altering his course across our bow. The sailors and lookout man knew that; they are the ones who would know, if they could hear.

Q. Why would they know any better than you would?

A. They were nearly 100 feet closer to her.

Q. You think 100 feet would make a difference in hearing and not hearing on that vessel?

A. Decidedly on any vessel.

Q. Under the conditions of wind, weather and sea that day you think men on the deck could hear that whistle when you could not hear it on the bridge?

A. They would hear it ahead of me; it is over 100 feet to the forecastle and a man would hear it better than I.

Q. Would he hear it when you could not hear it at all?

A. He could hear 100 feet sooner than I would.

Q. You say you did not hear it at all?

A. No, sir.

Q. You say the sailors, the lookout could hear it?

A. I said possibly. [61]

Q. Did you ask them how many blasts sounded?

(Deposition of Walter N. Beckwith.)

A. One of them hollered aft one whistle.

Q. Did you ask them how many blasts sounded?

A. No, sir, they volunteered the information.

Q. Who was it?

A. One man on deck, either the lookout man or one man on deck.

Q. How high is the forecastle head above the deck? A. 7 or 8 feet.

Q. How much sheer to your vessel?

A. The water-line—

Q. (Intg.) On your main deck how much sheer?

A. From what points?

Q. What is the sheer of your main deck?

A. I don't know.

Q. Any sheer at all? A. Yes, sir.

Q. How much in your judgment?

A. Raise of about four or five feet, I should judge; more than that, possibly six feet.

Q. How far from the water was your main deck aft? A. Aft?

Q. Yes, drawing 16 feet?

A. A couple of feet, three feet may be.

Q. How far forward?

A. Three and six are nine.

Q. Then the bow of your vessel was much higher out of the water than the stern?

A. Considerably higher.

Q. Above the main deck seven or eight feet of the forecastle-head? A. Yes, sir.

Q. How much sheer is it to the forecastle deck?

A. The forecastle deck is built in proportion to

(Deposition of Walter N. Beckwith.)

the deck and has the same sheer.

Q. How much sheer between that deck and the stem?

A. I cannot figure it out; I can figure it out with a pencil and piece of paper; I suppose it would be about a foot or a foot and a half. The forecastle deck is probably about 20-odd feet [62] long.

Q. So that stem on the forecastle deck would be 9 or 10 feet? A. The stem?

Q. The forward part of your forecastle deck?

A. Yes, sir, I should judge so.

Q. How could a man standing on the main deck see the "Beaver" ahead?

A. I did not see the "Beaver" ahead; I did not know any one saw the "Beaver" ahead.

Q. You say she was three points off?

A. That is, on the bow.

Q. How much is three points?

A. 33 degrees.

Q. At an angle of 33 degrees over your forecastle-head, how much higher would the side of your ship be at that place than at your main deck?

A. I do not understand the question.

Q. At what point on your forecastle-deck would a three-point bearing be?

A. All points are the same from stem to stern. A three-point bearing is an angle of 33 degrees.

Q. Was the "Beaver" abeam of you?

A. No, sir.

Q. She was three-quarters of a mile ahead?

A. Yes, sir.

(Deposition of Walter N. Beckwith.)

Q. And three-quarters of a mile off to one side?

A. Practically about that.

Q. Then she was about 33 and a third degrees off the bluff of your bow on your forecastle-head abaft your stem? A. Abaft the stem?

Q. Yes.

A. No, sir, she was forward of the stem. She could not possibly be bearing 33 degrees and be abaft of the stem, impossible.

Q. Assume this drawing is the "Necanicum"?

A. Yes, sir.

Q. What would be an angle of 33 and a third degrees; where would you have the "Beaver"?

A. Something like that. (Indicating.) [63]

Q. Off the line I am drawing here?

A. Yes, sir. That is hardly enough; it would be a little more this way. (Indicating.)

Q. You draw the line where you think it would be. A. Yes, sir.

Q. Off like that? A. Yes, sir.

Q. This would be the position of the "Beaver" then? A. No, sir; decidedly not.

Q. What I mark is the "Beaver" as you have drawn it? A. Yes.

Q. This is the "Necanicum"? A. Yes, sir.

Q. And you saw the "Beaver" in about the angle A-B. Is that true? A. That is it.

Q. What I want to know is, you say that your forecastle-head is seven or eight feet above the main deck? A. Yes, sir.

Q. You are speaking of the break of the forecastle

(Deposition of Walter N. Beckwith.)

on that part? A. Yes, sir.

Q. That is the line C-B? A. Yes, sir.

Q. How much higher would the point "A" be than the break of the forecastle?

Mr. DENMAN.—What is "A," the deck or rail?

Mr. CAMPBELL.—Q. Take it on the rail. Is there a solid bulwarks around there?

A. A rail about 16 inches.

Q. Take it from the top of the rail then.

A. That would be 16 inches higher than the forecastle-head.

Q. How much higher would that point be than that part of the forecastle-head?

A. That point there?

Q. Yes.

A. A couple of feet, I guess. I don't know; I cannot answer that authentically.

Q. So that the point to see the "Beaver" from the point "A"—

A. (Intg.) You don't need to be at point "A" to see the "Beaver."

Q. Where was the man on deck that called out that she blew one [64] whistle?

A. I don't remember.

Q. Down on the main deck, was he?

A. I don't remember.

Q. You do not remember?

A. No, sir; I remember what the men said in the life-boat.

Q. Up in the life-boat? A. Yes, sir.

Q. What did they say?

(Deposition of Walter N. Beckwith.)

A. No sound; they says, "Nothing but water coming out of his whistle."

Q. I am talking about the man now who reported one whistle to you.

A. I did not say; I surmised that she blew one whistle. Someone stated that there was one whistle blown, I believe.

Mr. CAMPBELL.—I offer this drawing in evidence that the witness just made.

(The drawing is marked "Libelant's Exhibit 1.")

Q. No one reported one whistle blown?

A. Somebody stated in passing.

Q. When, afterwards?

A. In the general line of conversation.

Q. When? A. Before the collision occurred.

Q. In the general line of conversation some one said she had blown one whistle?

A. Someone said she blew one whistle.

Q. Where were you at the time?

A. On the bridge deck.

Q. The after part of it?

A. In the vicinity of the bridge.

Q. Who were you holding a conversation with?

A. General conversation getting the men out of the way and the second mate up.

Q. You do not recall whether it was somebody on the main deck or not that said that?

A. No, sir: I cannot recall it; someone stated one whistle was blown.

Q. Why didn't you blow the danger whistle when you saw steam coming?

(Deposition of Walter N. Beckwith.)

A. That would necessitate a loss of time.

Q. What loss of time?

A. Because immediately when the other [65] vessel was crossing our bow, placing us in jeopardy, we immediately backed to get out of danger; we also let him know what we were doing by blowing three whistles; it was his place to blow the four whistles.

Q. Why, because he saw you were doing the wrong thing?

A. We did not do the wrong thing.

Q. What is then?

A. Any time he did not want to pass, so we indicated by our whistle, he could have blown four whistles, stopped, gone astern and navigated with caution until the proper signals were given and understood.

Q. Are you not required in danger to blow four whistles?

A. You are required to back astern, use your own judgment, get out of the way.

Q. You thought there was going to be a collision?

A. Yes, sir.

Q. You thought it at that time? A. Yes, sir.

Q. Did you renew your two blasts?

A. No, sir, we backed.

Q. You did not blow the danger whistle?

A. No, sir.

Mr. DENMAN.—I submit he testified he blew three whistles which is also the danger signal under those circumstances.

A. I did not do that; the captain did that.

(Deposition of Walter N. Beckwith.)

Mr. CAMPBELL.—Q. You were not there at the time it was done?

A. I was on the bridge.

Q. You had gone aft to call the men?

A. Just at that time?

Q. Yes.

A. I never left the bridge deck until after the collision occurred.

Q. When you say you never left the bridge deck you mean you never left the cabin roof?

A. Yes, sir, in the vicinity of the bridge.

Q. Had you gone to the aft end of the cabin roof to call the [66] second officer?

A. That is where I was.

Q. How far is that from the bridge, 40 feet?

A. 15 feet. The captain was on the bridge at the time, had command of the ship.

Q. What time was that?

A. What? When the collision occurred?

Q. The time you blew your two blasts?

A. Shortly before the collision occurred.

Q. At what time?

A. I should judge two and a half or three minutes.

Q. Before the collision? A. Yes, sir.

Q. What time did the collision take place?

A. Between 2:15 and 2:20; I should judge 2:18.

Q. Did you take the time? A. Nearly.

Q. Did you look at the time?

A. When I logged I looked at the time.

Q. What do you mean by that?

A. Change of course, turn the ship around; after

(Deposition of Walter N. Beckwith.)
the collision I looked at the time.

Q. You understand my question?

A. Yes, sir, I answered it.

Q. What time did you blow your two whistles.
You say two and a half or three minutes before the
collision. I say, what time did the collision take
place?

A. Between 2:15 and 2:20; I should judge 2:18.

Q. Did you take the time at that time?

A. I must have or I would not have known it.

Q. What did you take it from? A. Watch.

Q. Have you a clock on your bridge?

A. No, sir.

Q. Did you note the time down? A. Yes, sir.

Q. Where? A. In the log-book.

Q. At the time that you actually took it?

A. I was [67] engaged then.

Q. You wrote up the log after?

A. Yes, sir; after the collision occurred.

Q. Did you put back to San Francisco?

A. Yes, sir. I could not write it during the col-
lision.

Q. When you say that the "Beaver" was going
six or eight knots, she must have been at reduced
speed then?

A. When did I state she was going six or eight
knots?

Q. During your direct examination.

Mr. DENMAN.—Q. You mean six or eight knots
at the time of the collision.

Mr. CAMPBELL.—Q. I mean what he said.

(Deposition of Walter N. Beckwith.)

Q. What did you mean on your direct examination when you said the "Beaver" was going six or eight knots? A. When she struck us.

Q. She had been backing?

A. Evidently she had been backing.

Q. Had she given you any signal she was backing?

A. I could not discern then; I could not say.

Q. Did you watch the steam to see it?

A. I watched the steam; no sound emitted.

Q. No sound emitted?

A. Various whistles were heard afterwards.

Q. Do you think the "Beaver" could see you at the time you blew your passing whistle?

A. Yes, sir.

Q. Had you been blowing fog signals?

A. Yes, sir.

Q. How often?

A. Intervals of not more than a minute and long blasts according to law.

Q. What does the law require of fog-whistles?

A. Long blasts at intervals of about one minute, not more.

Q. Is that what the law requires?

A. Yes, sir; that is the [68] coast law. The international is intervals of two minutes; on this coast it is one minute.

Q. What rules apply out there where you were?

A. That would be the international laws of navigation.

Q. Two minutes?

(Deposition of Walter N. Beckwith.)

A. No, sir, on this coast they require one-minute intervals.

Q. Who require it?

A. The Inspectors; the United States Steamboat Inspectors.

Q. Have you seen the rules requiring that on this coast?

A. I have passed several examinations and found it out, and it has always been so.

Mr. DENMAN.—Q. As a matter of fact, the automatic signals on the steamers are fixed?

A. They are fixed as a rule where automatic whistles are set at 8, or 6, or 9 second blasts every one minute of 58 seconds, or I have them set; they are like a clock.

Mr. CAMPBELL.—Q. What was there in your judgment that would cause the “Beaver” to alter her course and attempt to pass you port to port when you could have passed three miles apart starboard to starboard?

A. Poor judgment on the bridge of the other vessel.

Q. Any physical reason that would be required?

A. No, sir; not to my judgment.

Q. Nobody but a crazy man would have attempted to do it?

A. A man who loses his head by inexperience would do it.

Q. What kind of wind and weather was there?

A. Light southerly airs.

Q. No sea? A. Moderate sea.

(Deposition of Walter N. Beckwith.)

Q. What kind of sea? A. Moderate sea.

Q. Which way was it running?

A. Moderate sea, no swell, [69] moderate; very little; just white bubbles.

Q. Practically no sea at all?

A. Practically none; moderate.

Q. Why did you enter in your log you blew two blasts of whistle which he answered with one, when you did not hear him answer with one?

A. I took someone's statement for it.

Q. How long had your vessel gained sternway before they actually came together?

A. Authentically I could not state, but I judge she gained sternway three-quarters to one mile.

Q. How fast was she going sternway at the time of the collision, astern?

A. Three or four miles probably.

Q. Astern? A. Yes, sir.

Q. She was going nearly as fast astern as the "Beaver" was going ahead?

A. Not anywhere, not near as fast; she could not go as fast astern as the "Beaver" was going ahead.

Q. Where had you come from this trip?

A. You mean our port of departure?

Q. Yes. A. San Pedro.

Q. Did you come into San Francisco at all?

A. No, sir.

Q. I don't see any notation in your log of your having reduced your speed from one o'clock in the morning. Don't you note your reductions of speed?

A. Yes, sir.

(Deposition of Walter N. Beckwith.)

Q. Were you running at full speed all that time?

A. My watch was. I am not responsible for the second mate's log.

Q. You were running full speed from the time you went on the bridge at 12 o'clock up to the time of the collision?

A. What we go by full speed is the telegraph was on full; in foggy weather it is customary for the engineer to reduce slightly during the time fog signals are going; that is to avoid when you stop the popping off of steam.

Q. Don't you note in your log any changes of speed you give [70] to the engine-room?

A. Not in all cases; if we change the speed on the telegraph, if we direct it, we note it.

Q. You gave no direction of reduced speed at all?

A. I gave none; whether the captain or second mate did, I don't know.

Q. I am speaking about yourself. A. I did not.

Q. You were running along your course at regular full speed with your telegraph set at full speed?

A. There was a slight reduction in the engine-room.

Q. You do not know anything that happened in the engine-room at all, do you?

A. I have a very good idea it was reduced.

Q. Who told them to reduce the speed?

A. It is their duty.

Q. Did you ever tell them to reduce the speed?

A. I never had occasion to, they had that much sense to do it.

(Deposition of Walter N. Beckwith.)

Q. Will you say you never told them to reduce the speed? A. No, sir.

Q. Let me see the statement you delivered to the Inspectors, and I will finish the cross-examination.

(Mr. Denman hands counsel paper.)

Mr. CAMPBELL.—You have had this all the time while I was under the impression it was in the office of the company.

Mr. DENMAN.—What are you talking about?

Mr. CAMPBELL.—I demanded a while ago the production of a copy of the statement furnished the inspectors and asked you to send to the office for it and you pull it now out of your own folder, and you knew it all the time.

Mr. DENMAN.—If you look at the record, what you asked for was a copy of the statement made to the company and not to the United States Inspectors at all.

Mr. CAMPBELL.—The record very clearly shows I asked the [71] witness to produce a copy of the statement given to the inspectors, and he said a copy was left with the owners.

The WITNESS.—That looks like the report. I cannot state it is word for word.

Mr. DENMAN.—Q. The fact is the two are not identical? A. Not identical.

Mr. CAMPBELL.—I will ask further for the copy of the owners.

Mr. DENMAN.—That is what you asked for before.

(Deposition of Walter N. Beckwith.)

Mr. CAMPBELL.—You understood exactly what I asked for.

Q. What is it customary for the lookout to do in the fog?

A. To note the approach of vessels if sighted and immediately report all whistles heard.

Q. How often does your lookout report to the bridge he cannot hear any whistles?

A. When he does not hear anything he remains there.

Q. Why did you put in your report: "The lookout reported twice he could hear no fog-whistles?"

A. I expected to hear them.

Q. Did he report he could not hear them?

A. Yes, sir.

Q. Did you ask him if he could hear the fog-whistles?

A. I did. I was sounding mine at regular intervals.

Q. How soon did you start to alter your course to starboard after you sounded your two blasts?

A. About the same time I gave the order.

Q. I mean starboard your helm?

A. I ordered it about the same time. I did not alter the course to starboard, however.

Q. What was the damage done to your vessel?

A. The stem was damaged, hawser-pipe crushed and anchor driven into the ship's side, rudder-post cracked, tiller bent.

Q. Do you know the size of your tiller?

A. About three [72] inches square.

(Deposition of Walter N. Beckwith.)

Q. Three and a quarter by three and a quarter, is it not?

A. About that; I could not state for sure.

Q. Which hawser-pipe was it?

A. The port hawser-pipe.

Q. And the port anchor was the one damaged?

A. Yes, sir.

Mr. CAMPBELL.—That is all.

Redirect Examination.

Mr. DENMAN.—Q. Mr. Beckwith, what speed were you making at the time you sighted the “Beaver”?

A. I should judge about eight knots.

Q. Do you know the “Beaver” by sight?

A. Yes, sir.

Q. Were you able to recognize her the first time you saw her?

A. I did not know, but I thought it was either the “Bear” or “Beaver”; the “Beaver” and the “Bear” are identical, you know; very much alike.

Q. You say that you hailed the men; what actually happened, did you call out to them to come out?

A. The captain hailed him. Our captain—

Q. You say you hailed the men forward in the fore-castle-head?

A. Yes, sir.

Q. You have a very good voice?

A. Fair to middling.

Q. You turned your voice loose?

A. Yes, sir.

Q. You stamped on the deck for who?

A. The second mate; also instructed a man to go down and get the log line in.

Q. What side of the vessel was the log line on?

(Deposition of Walter N. Beckwith.)

A. The port side.

Q. Did he get the log line in?

A. I did not haul it in myself.

Q. Before the collision?

A. I could say for sure; yes, he must have. In all probability he did; I could not [73] state for certain.

Q. Your recollection is he did get it in before the collision? A. From his own statement.

Q. He said he did? A. Yes, sir.

Q. How long was the line? A. About 200 feet.

Q. And he hauled it in by hand?

A. Yes, sir; a small line.

Q. Where was the man you sent to haul it in?

A. He was with the second mate.

Q. Did you see him? A. No, sir.

Q. He was with the second mate where, in the second mate's cabin?

A. No, sir; out on the after-deck taking in the log line.

Q. He was not taking it in before you ordered him to do it?

A. No, sir; he was up on the bridge deck, on the life-boat.

Q. And you sent him down to take the log line in?

A. Yes.

Q. How did he get down?

A. He went down the companion ladder.

Q. Where is that with reference to the bridge?

A. The aft end of the bridge.

Q. The aft end of the cabin roof?

(Deposition of Walter N. Beckwith.)

A. Yes, sir; the aft end of the cabin roof.

Q. He took the log line in from the cabin deck?

A. Yes, sir.

Q. I forgot to ask you, you gave some testimony as an expert regarding the amount that your vessel would swing if her helm were put to port going at eight knots in half a minute's time, and your statement was from one to eight points, you could not tell? A. I would not commit myself.

Q. Would not that depend on the amount the wheel was put over? A. Yes, sir.

Q. Could anybody except the helmsman who was actually there, [74] who actually saw it tell how much she turned in that time?

A. I don't think they could.

Q. Even then he would have to know how many spokes the wheel went over?

A. Yes, sir; it would be very hard to keep track of it.

Q. How, as a matter of fact, do you know how many spokes the vessel was put over? A. No, sir.

Q. When you ordered the vessel to port her helm?

A. No, sir; starboard her helm.

Q. I mean starboard her helm.

A. No, sir; I do not know. I know he was in the act of starboarding his helm.

Q. The only order you gave as I understand it, the only order you gave to the helmsman after the "Beaver" came in sight was an order starboarding her helm? A. Yes, sir; that is the only order.

Mr. DENMAN.—That is all.

(Deposition of Walter N. Beckwith.)

Recross-examination.

Mr. CAMPBELL.—Q. There is no doubt in your mind but what you could swing eight points with that vessel by starboarding your helm at the speed she was running in a minute, is there?

A. There is not any doubt?

Q. Yes.

A. No, sir; there is doubt; I do not know; eight points in a minute? There is room for doubt.

Q. How far do you think she would swing?

A. One to eight points; I could not tell; I am not an expert on that. I never made a study of that; I never had occasion to.

Q. If you were meeting a vessel head on stem to stem and the other vessel should hold her course and you were running at the same speed you were running this day, and should starboard your helm—

A. (Intg.) I would not do such a [75] thing.

Q. And port your helm and she was a mile distant from you could not she easily clear?

A. Running stem to stem?

Q. Yes. A. And I port my helm?

Q. Yes. A. Yes, sir; surely.

Q. How many points off in a minute's time would you swing? A. What was that question?

Q. How many points could you swing off in a minute's time?

A. I do not think it would be necessary to swing in a full minute's time.

Q. How far would you swing in a full minute?

A. From one to eight points.

(Deposition of Walter N. Beckwith.)

A. You know closer than that?

A. I cannot tell; a vessel acts different on different times.

Q. How long have you been in this vessel?

A. Now?

Q. Yes. A. About 10 months now.

Q. How far would she swing under those conditions in a minute? A. From one to eight points.

Q. Would she swing two points? A. Possibly.

Q. Would she swing three points? A. Possibly.

Q. In your judgment would she swing three?

A. I said possibly.

Q. Would she swing four in your judgment?

A. Possibly.

Q. Would she swing five? A. Possibly.

Q. Have you not any judgment at all as to how far she would swing in a minute?

A. Not expert judgment.

Q. What is your best judgment as to how far she would swing? A. In a minute?

Q. Yes.

A. I should think she would swing two or three [76] points.

Q. Two or three points? A. Yes, sir.

Q. In a minute's time?

A. Three or four—well, one to eight points.

Q. That is as close as you can get?

A. Yes, sir, without committing myself. If I had lots of time I would go down and try for your satisfaction.

Mr. DENMAN.—Q. Without committing your-

(Deposition of Walter N. Beckwith.)

self, Mr. Beckwith, counsel is entitled to your fair judgment, and I understand your answer to be you cannot give a scientific answer.

A. If you go down there to-day and take that vessel out she might swing clear around eight points in a minute; I might do it to-morrow and it would take several hours; in some conditions she would only go two or three points.

Mr. CAMPBELL.—Q. What difference was there?

A. That is not known to me.

Q. You cannot tell how your vessel would swing when you starboard your helm, what effect it would have on it?

A. If you starboard your helm it will swing to port.

Q. That is all you know. You don't know how far she will swing in a minute, two minutes, or three minutes?

A. I know if the "Beaver" kept right on she would have swung well clear of me.

Q. Is that a fair answer to my question?

A. I should think so.

Q. Is that your answer?

A. I don't know; I cannot tell authentically how far she would swing.

Q. If you were meeting a steamer stem to stem a mile distant under the same conditions of weather and sea that you had at this time, and making the same speed, how much would you port [77] her helm and alter her course to starboard to clear the other vessel, provided the other steamer would hold

(Deposition of Walter N. Beckwith.)

her course? A. What distance?

Q. One mile?

A. A point and a half or two points for safety; it would all depend on what vessel I was in.

Q. On the "Necanicum"?

A. A point and a half.

Q. Do you think you could do it and avoid a collision under those conditions?

A. Yes, sir, if the other vessel maintained his course and speed.

Q. Don't you think in this case if you had starboarded your helm and not reduced her speed, kept on at full speed, you would have swung away and avoided the "Beaver," avoided the collision?

A. I do not think so, in that case he would have struck us aft.

Q. At the time you were three-quarters of a mile ahead and to one side, don't you think if you had kept right on and not have reduced your speed and starboarded your helm, don't you think you could have swung off?

A. He had a higher powered vessel and he could chase us around the ocean and get us.

Mr. DENMAN.—Q. By chasing you around the ocean, you mean you cannot determine—

Mr. CAMPBELL.—(Intg.) I object to counsel leading his own witness.

Mr. DENMAN.—Q. What do you mean by chasing you around?

A. I could not judge what he was going to do after he had made this change in his course; I would not

(Deposition of Walter N. Beckwith.)

be able to tell, determine what the man on that bridge was going to do; whether he was going to port, starboard, back or go ahead; I took no chances. It was not up to me, it was up to the master of the other vessel, and the only thing for him to do to determine [78] for the safety of his own vessel, he could back her full speed and give the signal.

Q. What was the heading of your vessel at the time of the impact? A. I did not see.

Q. How much do you think the "Beaver" swung off her course?

A. She must have went four points, something like that; three or four points.

Q. She was approaching ahead of you when you saw her? A. Off to the starboard.

Q. 15 degrees you have put it? A. Yes, sir.

Mr. CAMPBELL.—Q. You are going to remain in the "Necanicum" as far as you know right along?

A. I don't know.

Q. You do not know that you are going to leave her? A. No, sir, I don't know.

Q. And she is plying regularly on the coast?

A. Yes, sir.

Mr. CAMPBELL.—I will ask that the examination be continued until we have had an opportunity of seeing the report that was filed with the owners.

Mr. DENMAN.—Then I suggest as I would like to close the deposition before this gentleman leaves port, that we take it up in the morning. I will have it here if I can get it.

Mr. CAMPBELL.—It may be I will not have any

(Deposition of Walter N. Beckwith.)

questions to ask him; if I do not want to, I will let you know in time.

Mr. DENMAN.—I do not want to have the deposition hang fire in case anything happens to him, or he is drowned, we would not have the use of the deposition because the cross-examination is open.

Mr. CAMPBELL.—I will not question that point at all. [79]

Deposition of John T. Gannan, for Claimant.

JOHN T. GANNAN, called for the claimant, sworn.

Mr. DENMAN.—Q. What is your occupation?

A. I am a sailor.

Q. How long have you been a sailor?

A. Well, I shipped first on the 23d of July, 1907.

Q. Were on the "Necanicum" at the time of the collision with the "Beaver" last October?

A. Yes, sir.

Q. Where were you at the time of the collision?

A. I was down in the forecastle.

Q. In the forecastle? A. Yes, sir.

Q. What were you doing there?

A. Our watch below after 12 o'clock, sitting playing cards.

Q. Did you, before the collision, hear any conversation between the bridge and the forecastle?

A. Yes, sir.

Q. What was it? A. I heard the—

Mr. CAMPBELL.—(Intg.) Objected to on the ground as being a self-serving declaration on the part of the claimant, and hearsay.

(Deposition of John T. Gannan.)

Mr. DENMAN.—We offer it as part of the *res gestae*.

A. I heard Mr. Beckwith give two whistles, her starboard side to, and he hollered to Christy, he says, “Can you see it?” He says, “Yes, I can see the starboard side too, but I can hear no whistle.”

Q. When did this occur, how long before the collision?

A. I should judge about 15 or 20 minutes.

Q. 15 or 20 minutes. Have you been drinking?

A. Well, it might have been longer than that, or it might have been shorter.

Mr. DENMAN.—This witness is evidently not in a position [80] to testify. If you want him you can take him.

Mr. CAMPBELL.—He is not my witness. The witness seems to be intelligent enough to know what you are asking him.

Mr. DENMAN.—Take the witness.

Mr. CAMPBELL.—No questions.

Mr. DENMAN.—That is all.

Mr. CAMPBELL.—What is your address, Mr. Gannan—where do you live?

A. The only place I can give you is the steamer “Necanicum,” Hammond Lumber Company. I don’t know what port we are going to load.

Deposition of George A. Olsen, for Claimant.

GEORGE A. OLSEN, called for the claimant, sworn.

Mr. DENMAN.—Q. Mr. Olsen, what is your occupation?

(Deposition of George A. Olsen.)

A. I am driving a winch; I am a winchman.

Q. Where are you occupied?

A. On the "Necanicum."

Q. Were you on the "Necanicum" at the time of the collision with the "Beaver"? A. Yes, sir.

Q. Whereabouts were you on the ship at that time?

A. I was working amidships, pretty close to the bridge on the main deck.

Q. About what time did the collision occur?

A. Just about two o'clock.

Q. Do you remember the exact time?

A. I could not say as to the time; it was just about two o'clock.

Q. Did you see the "Beaver" or did you hear any whistles from the "Necanicum"? A. Yes, sir.

Q. How many?

A. I heard the fog-whistles of her and saw him blow two whistles.

Q. How long before the collision was it he blew the two whistles?

A. Well, it might have been two or three minutes; [81] about three minutes.

Q. Did you see the "Beaver"?

A. Yes, sir, I saw the "Beaver" after we blew the two whistles, a little while after.

Q. How long after?

A. It might have been about half a minute; 25 seconds or so.

Q. Where was she then when you saw her?

A. She was three points on the starboard bow, about three points.

(Deposition of George A. Olsen.)

Q. How long after that did the collision occur?

A. About a minute, or so, I guess; something like that. He was not very far off then.

Q. How far off would you say he was at that time?

A. A little less than half a mile.

Q. Was there any shock from the collision?

A. Yes, sir, quite a shock.

Q. Did it knock you down?

A. No, sir, I was holding on to a chain lashing; I could not fall down.

Q. How long have you been at sea altogether?

A. About 22 years.

Q. Are you going to sea to-morrow?

A. Yes, sir.

Q. On the "Necanicum"? A. Yes, sir.

Mr. CAMPBELL.—No questions.

Mr. DENMAN.—I have withdrawn the witness Gannan on account of his intoxication, and will endeavor to reproduce him when he is fit to testify, and I extend my apologies to my opponent for having given him such a witness to cross-examine. [82]

Tuesday, April 28th, 1914.

Mr. CAMPBELL.—I would like to inquire the reason for retaking the deposition of Mr. Olsen.

Mr. DENMAN.—I have recalled him.

Mr. CAMPBELL.—This man was not intoxicated the other day; the other man was.

Mr. DENMAN.—I thought it was understood between us this other man's deposition was not to be written up.

Mr. CAMPBELL.—I did not think this man was intoxicated. I want all the testimony.

**Deposition of George A. Olsen, for Claimant
(Recalled).**

GEORGE A. OLSEN, recalled for the claimant.

Mr. DENMAN.—Q. You are a sailor, are you not,
Mr. Olsen? A. Yes, sir.

Q. Now on the steamer “Necanicum”?

A. Yes, sir.

Q. Were you on the “Necanicum” at the time of
the collision with the “Beaver”? A. Yes, sir.

Q. How long had you been on her?

A. About 14 months.

Q. About 14 months? A. Yes, sir.

Q. Where were you say within the 10 minutes prior
to the collision?

A. I was on the main deck just in front of the
bridge.

Q. What was the condition of the weather—were
there any signals blown during the time you were on
the deck before the collision?

A. Yes, sir; blowing fog-whistles.

Q. How long did they continue?

A. Blowing the whole—well, they blew the signals
long after they had passed the other ship.

Q. Kept on blowing the signals after you passed
the other [83] ship? A. Yes, sir.

Q. How long before the collision had they been
blowing?

A. They had been blowing the whistles about an
hour before, I should think.

Q. What were you doing just prior to the collision?

A. I was splicing a piece of wire.

(Deposition of George A. Olsen.)

Q. On the main deck? A. Yes, sir.

Q. Whereabouts on the main deck?

A. Just about amidships.

Q. About amidships?

A. Right below the bridge in front of the bridge.

Q. Were there any signals blown prior—any passing signals blown prior to the collision?

A. Yes, sir; we blew two whistles.

Q. And how long before the collision was that?

A. I could not say exactly, a minute or two.

Q. What did you do then?

A. Well, I went over the rail when I did not hear no answer and waited a little while.

Q. How long do you suppose it was?

A. It might have been 15 seconds, half a minute.

Q. What did you see when you went over the rail?

A. I saw the other ship.

Q. Whereabouts was she with reference to your vessel, in what direction at the time you saw her?

A. She was about three points on the starboard bow.

Q. Did you get any signals from her?

A. She blew one whistle.

Q. When you first saw her from the side of the vessel what could you see of the other vessel, her sides, or what?

A. I saw her bow; she was in the act of turning.

[84]

Q. You heard just one whistle. What direction did she turn?

A. She turned to starboard, one whistle.

(Deposition of George A. Olsen.)

Q. How much fog was there between you and her when you first saw her?

A. It was not very thick. It was not very heavy.

Q. It was not very heavy? A. Yes, sir.

Q. It was foggy though?

A. Yes, sir, it was foggy.

Q. How far off would you say she was?

A. Between a quarter of a mile and half a mile.

Q. Did you watch her until the collision occurred?

A. Yes, sir.

Q. Whereabouts did the vessels come together?

A. Well, I don't know exactly how far it would be from her bow, about 30 feet; 30 or 40 feet.

Q. On her bow?

A. Yes, sir, on our bow, it was on the stem.

Q. Struck on the stem? A. Yes, sir.

Q. On which side?

A. It was right on the stem.

Q. Did she hit the anchor on either side?

A. She could not catch the anchor.

Q. Are you sure of that? A. Yes, sir.

Q. What signals did you hear from your own vessel after the two-whistle signal?

A. Blow three whistles.

Q. What does that mean?

A. They are reversing the engine.

Q. Could you tell whether your vessel was reversing the engines, or not?

A. Yes, sir, you could tell.

Q. You could tell? A. Yes, sir.

Q. How could you tell?

(Deposition of George A. Olsen.)

A. Tell by the vibration of her when she started up.

Q. Did your vessel have any way on at the time of the collision? A. She had sternway. [85]

Q. Had sternway on? A. Yes, sir.

Q. How about the "Beaver"?

A. The "Beaver" had a pretty good headway when she passed us.

Q. How could you tell that?

A. I could see in front of her bow, the white water.

Q. How much speed do you think she had on her?

A. She might have had about five miles.

Cross-examination.

Mr. CAMPBELL.—Q. What is the distance between the break of your forecastle-head and the bridge?

A. Well, I could not say exactly, about 80 or 90 feet.

Q. And how far from the bridge were you standing? A. Well, I was right below.

Q. Right below the bridge?

A. Yes, sir, a little in front of the bridge too.

Q. About 10 or 15 feet?

A. About 10 feet, I guess.

Q. And how high is the bridge above the main deck? A. About 15 feet, I guess.

Q. Any more than that?

A. It might be a little more; not much more than that though.

Q. Then, you say standing where you were you heard the "Beaver's" whistle?

A. I heard the "Beaver's" whistle; yes.

(Deposition of George A. Olsen.)

Mr. DENMAN.—At which place, at the side?

Mr. CAMPBELL.—Q. Wherever he was at the time he heard it. He said he was on the main deck about 10 or 15 feet from the front of the bridge at the time you claim to have heard the whistle?

A. Yes, sir.

Q. Amidships? A. Yes, sir.

Mr. DENMAN.—That was not his testimony.

Mr. CAMPBELL.—Q. Is that your testimony now?

A. I [86] heard his whistle; that is when he answered our two.

Q. Where were you standing at that time, 10 or 15 feet in front of the bridge; is that right?

A. Yes, sir.

Q. In the middle part of the vessel, amidships?

A. Yes, sir, amidships; when he blew the whistle I went over to the rail.

Q. Did you have any difficulty in hearing this one whistle of the "Beaver's"?

A. It was not much of a whistle he blew.

Q. Did you have any difficulty in hearing it?

A. I heard it.

Q. You heard it? A. Yes, sir.

Q. You knew what it was? A. Yes, sir.

Q. When did the whistle from the "Beaver" come with respect to the two whistles from the "Necanicum"?

A. It was a few seconds after we blew the two whistles.

Q. Immediately afterwards?

(Deposition of George A. Olsen.)

A. A few seconds; about 10 seconds.

Q. And it was then that you walked to the starboard side of your vessel? A. Yes, sir.

Q. And at that time you saw the "Beaver" three points on your starboard bow? A. Yes, sir.

Q. How far away?

A. Well, a quarter to half a mile; between a quarter and half a mile.

Q. Between a quarter and half a mile?

A. Somewhere near that; I could not say exactly.

Q. It might have been as much as three-quarters of a mile, might it not? A. I do not think so.

Q. Would you think the mate of your vessel on the bridge was in a better position to judge the distance than you were? A. He might be.

Q. Do you know what was done with the helm of your vessel upon blowing two whistles?

A. No, sir, I don't know. [87]

Q. Did you give any attention to whether or not your vessel was changing her course? A. No, sir.

Q. You did not pay any attention to that?

A. No, sir.

Q. But it was not until after you had heard the "Beaver's" whistle that you walked to the side?

A. Yes, sir.

Q. And it was not until you walked to the side of your vessel that you saw the "Beaver"?

A. I did not see her before.

Q. How long did you stand at the side there?

A. I could not say; it was a few seconds, I guess, until she struck.

(Deposition of George A. Olsen.)

Q. How long in your judgment was it from the time you reached the side of your vessel before the collision; how many seconds?

A. I don't know exactly.

Q. What is your judgment about it, 10 or 15 seconds?

A. A little more than that; about half a minute, I guess.

Q. Half a minute? A. Yes, sir.

Q. What were you doing there at that time when you were standing at the side?

A. I was looking at the ship.

Q. Were you looking at the water?

A. I looked at the water, too; just looking at the ship.

Q. Did you look at the water alongside of your vessel? A. Yes, sir.

Q. How high is the rail?

A. The rail is about four feet; four feet six.

Q. How high does it come to you, up to your shoulders? A. Up there (indicating).

Q. How tall are you? A. Five feet four.

Q. Five feet four inches? A. Yes, sir.

Q. And the rail is four feet six?

A. About four feet six. There is a waterway about eight feet above the deck—eight inches above the deck.

Q. Did you step up on the waterway?

A. Yes, sir. [88]

Q. What did you do that for?

A. Because it is that wide from the rail, you got to

(Deposition of George A. Olsen.)

when you go to the rail.

Q. How do you know your vessel had sternway on her at the time of the collision?

A. I could see by the water.

Q. What was there about the water to indicate it?

A. The water goes ahead.

Q. The water was ahead?

Mr. DENMAN.—He said the water goes ahead.

Mr. CAMPBELL.—Q. Do you know whether the fact the water was going ahead would necessarily indicate she had sternway? A. Yes, sir.

Q. Is it not a fact when you begin to reverse any vessel she will throw the water towards your bow?

A. No, sir; it might after a while, little way; she will have sternway by that time.

Q. How far has the water got to get before you have sternway? A. I do not know.

Q. How far in your judgment?

A. I could not say.

Q. Half the length of the vessel?

A. I don't think so. I don't think it will reach that far.

Q. One-third length of the vessel?

A. It might be.

Q. In your judgment if you can see backing water from the propeller one-third the length of the vessel from the stern your vessel has sternway?

A. She will have sternway then.

Q. Where did you walk to the side of your vessel, directly opposite the point where you were standing when you heard the whistle?

(Deposition of George A. Olsen.)

A. A little further ahead.

Q. How much?

A. Not very much; about eight or 10 feet.

Q. What other whistles did you hear from the "Beaver" besides the one whistle?

A. I could not say; he was blowing some [89] whistle, but I do not know what it was.

Q. Why don't you know?

A. I could not make it out.

Q. You had no difficulty in making out the first one?

A. That was one; otherwise I do not know what he blew.

Q. Did you hear them?

A. He was blowing something.

Q. You heard them all right?

A. He was blowing some whistles, I do not know what it was.

Q. What did you think they were at the time?

A. I could not say.

Q. Didn't you entertain any thought at the time as to what they were? A. No, sir.

Q. Had your vessel been blowing fog-whistles right up to the time that she blew her passing whistles? A. Yes, sir.

Q. Were you the man that the mate sent to call the sailors out of the forecastle? A. No, sir.

Q. Have you discussed this case since your deposition was taken before with Mr. Denman?

A. No, sir.

(Deposition of George A. Olsen.)

Q. Have you not talked it over with your attorney at all?

A. The last time I was up here he spoke to me about it.

Q. Has he not gone over the case with you this morning? A. No, sir.

Q. Who have you discussed it with?

A. Mr. Denman.

Q. Have you discussed it with Mr. Burnett?

A. No, sir.

Q. With the officers of your vessel? A. No, sir.

Q. Anybody connected with the company?

A. No, sir.

Mr. CAMPBELL.—That is all.

Mr. DENMAN.—That is all. [90]

**Deposition of John T. Gannan, for Claimant
(Recalled).**

JOHN T. GANNAN, recalled for the claimant.

Mr. DENMAN.—Q. Mr. Gannan, were you on the steamship “Necanicum” at the time of the collision with the “Beaver”?

A. Yes, sir.

Q. How were you employed on her then?

A. As a sailor.

Q. Where were you at the time of the collision?

A. In the forecastle.

Q. Was it your watch below? A. Watch below.

Q. What time did you go off watch? A. 12:30.

Q. What were you doing down there?

A. We were playing a game of cards; we gener-

(Deposition of John T. Gannan.)

ally do after dinner before we turn in.

Q. Did you hear any fog-signals from your vessel prior to the collision? A. Yes, sir.

Q. How long had they been blowing, do you remember?

A. Blowing the fog-whistles all forenoon and up to the time of the collision. It was foggy that day.

Q. Did you hear prior to the collision any conversation or communications from the lookout to the bridge? A. Yes, sir.

Q. What did you hear—what time was this, how long before the collision?

A. Well, I could not exactly say; it was a very short while before the collision; I could not say exactly how many minutes.

Q. What did you hear?

A. I could hear the man from the bridge shouting and then I heard the lookout-man say, "I can see the starboard side; I cannot hear no signals from him."

Q. Did you hear any passing signals from your vessel after that?

A. I heard two whistles, and then I heard the lookout-man say, "I can see the starboard side"; and it was very short then, I could not exactly say how long, it was a very short [91] time I heard three whistles, full speed astern.

Q. Do you know whether she went full speed astern?

A. You could tell by the motion of the engine that she was backing up.

Q. What happened when she collided?

(Deposition of John T. Gannan.)

A. We all got knocked on the floor; we were sitting there playing cards.

Q. What did you do then?

A. We got ourselves up together, and the forward winch driver, he ran to the paint locker and got a lantern, so I turned around and raised the trap down into the forecastle, the trap-door to go down into the hold without taking the hatches off—the hatches were on; I went down into the hold to see if there was any water coming in.

Q. You did not go on deck until sometime after the collision?

A. I did not go on deck until quite a while after the collision. It was—

Mr. DENMAN.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. What were you going to say?

A. I was going to say it was a little bit of a while to get down through the small trap and get up again.

Q. How did it happen that you went down through a small trap into the lower hold without going out on deck from the forecastle when you knew that your vessel had been in a collision?

A. That was the first thing, as soon as the winch-driver got the lantern, to get down into the hold to see if there was any water coming in, any leak. The vessel had been struck,—in fact at the time I did not know where we was struck.

Q. Where is the forecastle on the main deck?

A. The forecastle? [92]

(Deposition of John T. Gannan.)

Q. Yes.

A. It is on the main deck; she is what we call a single ender.

Q. And it is immediately beneath the forecastle-head?

A. Walk right off the main deck, that is, it is over the hold, right in the forecastle door.

Q. How many of you were in there playing cards?

A. There was a sailor, two firemen and myself, and the forward winch-driver was in there.

Q. All engaged in playing a game of cards?

A. Yes, sir.

Q. And the first you heard was *you heard* the man on the bridge shouting?

A. I heard a man on the bridge shouting, but could not understand exactly what he was saying; the bridge is quite a distance from the forecastle-head.

Q. About 90 feet, is it not?

A. Yes; about that. It is 105 feet from the coam of the forecastle-head to the coam of the poop-deck; that would make the forecastle about 90 feet to the bridge; that is about where the officers stand on the bridge.

Q. And in response to the shouting that you heard from the bridge you heard the lookout say that he could see the starboard side, but he could not hear any whistle?

A. I cannot hear no signals from him.

Q. And you then continued playing cards all the time? A. Still continued playing cards.

Q. And then you heard after that, you say you

(Deposition of John T. Gannan.)

heard three whistles from your vessel?

A. After that I heard two whistles indicating star-board side to.

Q. Did you hear any whistles from the other vessel after the two whistles?

A. I heard no whistle from the other vessel at all.
[93].

Q. After you heard the two whistles you heard three whistles from your vessel?

A. I heard three whistles, very little while; one of the firemen made the remark, he says, "There is full speed astern."

Q. At the time of the collision you people were knocked down on the deck?

A. Not on the main deck; no.

Q. Were you knocked down?

A. We were sitting around a little table.

Q. On the floor of the forecastle? A. Yes, sir.

Q. You were all knocked down on that?

A. You have to step over a step about that high from the forecastle to the main deck (indicating).

Q. There is a stringer or break water across the after end of the forecastle-head?

A. Something over 24 inches.

Q. You were still playing cards, still sitting around the table when the collision came?

A. We were at the table when the collision struck and we all got scratched.

Q. How long do you think it was after you heard the three whistles until the collision?

A. I could not exactly say how many seconds or

(Deposition of John T. Gannan.)

minutes; it was a very, very short while.

Q. 15 or 20 seconds?

A. It might have been that, and it might have been some more.

Q. A very short interval of time?

A. Yes, sir; a very short time.

Q. After you were knocked down on deck did you know what vessel had struck you?

A. Not until after I came up out of the hold.

Q. And without going out of the fore-castle at all—who did you say, the fireman or boatswain went and got the lantern? [94]

A. The forward winch-driver got the lantern.

Q. Where was the lantern?

A. Down in the paint locker.

Q. Is that in the fore-castle too?

A. It is not inside the fore-castle; it is right outside—here is the fore-castle door and the paint locker is virtually here to the rear after you step out of the door on the starboard side of the ship.

Q. On the starboard side of the ship?

A. Here is our fore-castle where the sailors sleep and that was a room partitioned off that the firemen occupied.

Q. Make me a little drawing and give me the arrangement of those rooms; assume that what I am drawing is the outline of the shape of the ship. Show me the arrangement of the rooms in the fore-castle. A. Here is the—

Q. (Intg.) Draw it across.

(Deposition of John T. Gannan.)

A. Do you want me to draw the forecastle and the firemen's quarters?

Q. Yes. A. That is the firemen's quarters.

Q. Mark that L.

A. Yes, sir; on the starboard side of the ship.

Q. Here on this side?

A. Yes, sir. Here is what you call the forecastle; it runs clear up and then this off here is where the winch driver is in with the sailors; there is no room off between the winch driver and sailors.

Q. All this room where I draw the dotted line is one room? A. Yes, sir.

Q. What is that called, the forecastle?

A. Yes, sir, with the exception of one room they call the fore peak.

Q. Is there a partition there? A. Yes, sir.

Q. Show me the partition.

A. The forecastle is right straight up in the point. This partitions off the firemen from here to there; here is the door going into the fore peak, [95] what we call the fore peak, where the anchor spouts come through.

Q. The forecastle generally is where I have drawn the dotted line? A. Yes, sir.

Q. That is it? (Pointing.) A. Yes, sir.

Q. That I mark forecastle? A. Yes, sir.

Q. And forward of that in the very eyes of her is the fore peak?

A. Is what they call the fore peak.

Q. Whereabouts is the locker?

A. Then virtually here is the paint locker—I beg

(Deposition of John T. Gannan.)

your pardon, I have got that wrong. Here is your paint locker, it is outside the firemen's door; just the same the *the* toilet is on the port side. You have got to step out.

Q. Mark an X where the firemen's door is.

A. There is the firemen's door, and here is the paint locker (indicating).

Q. And the paint locker is what I mark 3?

A. Yes, sir.

Q. And the toilet is what I mark 4?

A. Yes, sir. You have got to step out of the forecastle to go into the paint locker, or to go into the toilet.

Q. Where is there a door from the firemen's quarters marked 1 into the forecastle?

A. The firemen cannot come into the forecastle from their room without stepping out on the main deck and come in the door.

Q. Is that the door into the forecastle from the main deck? A. Yes, sir.

Q. Mark that 2 X. A. Yes, sir.

Mr. CAMPBELL.—I will offer that drawing in evidence.

(The drawing is marked "Libelant's Exhibit 2.")

Q. And the forward winch-driver stepped out of the forecastle to the paint locker and got the lantern?

A. Yes, sir. [96]

Q. And came in the forecastle with the lantern?

A. As soon as he came in with the lantern I raised the trap-door. We got on our feet at the time he came back.

(Deposition of John T. Gannan.)

Q. Had he been knocked off his feet?

A. He was standing up between—coming down here is what they call—where the anchor chain runs down into the chain locker, there is two wooden spouts run up there and he was standing between those two spouts when she struck.

Q. Whereabouts was the table?

A. The table would be right about here, we will say that close, just about that way; that is the table; there is about that much space, I should judge.

Q. Mark that 6.

A. Yes, sir; there was about that much space between the table and going out of the forecastle to the main deck from here to here. (Indicating).

Q. Where are the two uprights that the winch-driver was standing between?

A. That is a little bit off here.

Q. Mark them with two small circles?

A. Yes, sir. Only virtually one man could stand in between them.

Q. He was standing there at the time of the collision? A. The winch-driver.

Q. And he went out into the locker and got the lantern and came back?

A. Yes, sir, and lit it.

Q. At the time he got back you people just picked yourselves off the floor?

A. Got straightened up.

Q. Then you opened the trap-door through the floor of the forecastle and went down into the lower hold to see what damage was done? A. Yes, sir.

(Deposition of John T. Gannan.)

Q. Did he tell you what steamer had struck you?

A. I did not know at the time, not until I came up. He went down first [97] and I followed him down. I opened the trap-door and he went down and I followed him down. There was no water there and we came up. Then I know it was the "Beaver."

Q. How did you know it was the "Beaver" then?

A. From what Prentagast said.

Q. Did you see her then?

A. At the time I got out on the main deck she was too far away, but I heard Prentagast holler, "My God! Nothing but water is coming out of her whistles."

Q. After you got on deck?

A. Just before I went down in the hold.

Q. Where was Prentagast?

A. Prentagast at that time was standing on the hatches, when I hear Prentagast holler this. I heard him holler, "My God! There is nothing but water coming out of her whistles." I could not say how long it was afterwards before I did come out of the forecandle, and then went up on the forecandle-head and looked over the bow.

Q. How long was this when you heard Prentagast call out—how long was that before the collision?

A. How long was that before the collision Prentagast hollered this out?

Q. Yes.

A. Prentagast did not holler this out until after the collision.

Q. Where were you when you heard him, still on

(Deposition of John T. Gannan.)

the floor? A. Still on the floor.

Q. But you said that you had just picked yourself off the floor when the winch-driver came back with the lantern? A. I got up off the floor.

Q. You were still on the floor when you heard Prentagast say there was water coming out of her whistles? A. No, sir, I was up. [98].

Q. Had the winch-driver then got back into the fore-castle at that time?

A. The winch-driver did not get inside of the fore-castle; he had not time to get inside the fore-castle. He has got back to the fore-castle door with the lantern; at that time I was up on my feet.

Q. At the time you heard Prentagast speak about the water in her whistles where was the winch-driver?

A. Standing in the door taking the globe off the lantern so he could light it.

Q. How far was it from that table outside of the fore-castle?

A. How far was it from the table outside of the fore-castle?

Q. Yes.

A. I think it is about—you might call it about five feet.

Q. And at no time did you go out to see what had struck you until after you came out of the hold?

A. Not until quite a while after the collision.

Mr. CAMPBELL.—That is all.

Redirect Examination.

Mr. DENMAN.—Q. How is the fore-castle venti-

(Deposition of John T. Gannan.)

lated? A. Four port holes.

Q. Were they closed or open on this day?

A. Open.

Q. How was the door prior to the collision?

A. The door was wide open.

Q. I understand when you came on deck you could not see the "Beaver"? A. No, sir.

Mr. DENMAN.—That is all.

Recross-examination.

Mr. CAMPBELL.—Q. Did anyone go to the port holes in the side of the forecastle and look out when your vessel blew three whistles and reversed?

A. Not that I know of, sir. It is pretty [99] high up.

Q. Was it not an unusual circumstance to have your vessel blow three whistles and reverse full speed in the fog?

A. Very, sir; very unusual, sir. That is the first time I ever heard him blow full speed astern.

Q. Yet you continued playing cards there after that time, until after the collision?

A. Playing cards until she struck.

Q. You did not play cards after she struck, did you? A. No, sir. [100]

Monday, May 11th, 1914.

Deposition of Austin Keegan, for Claimant.

AUSTIN KEEGAN, called for the claimant, sworn.

Mr. DENMAN.—Q. Captain Keegan, what is your occupation? A. Master of crafts; ship master.

(Deposition of Austin Keegan.)

Q. How long have you been to sea?

A. About 22 years.

Q. When did you get your first papers as an officer?

A. I think in 1897—

Q. (Intg.) Have you been on board steam and sail?

A. (Contg.) —I cannot give you that from memory. I have not my papers with me, and I cannot give you that from memory.

Q. 20 years ago, do you think?

A. The first papers I had were for sail; that was in, I think, 1902, along in there; I would not say for sure.

Q. 1902, for steam or sail? A. Sail.

Q. When did you first get your papers for steam vessels? A. I don't remember.

Q. Within the last ten years?

A. I would say about nine or ten years ago.

Q. About nine or ten years ago?

A. Yes, sir, roughly.

Q. Have you been steadily at sea during all that time, that is 22 years? A. On vessels and at sea.

Q. Were you on the "Necanicum" at the time of her collision with the "Beaver" last fall?

A. Yes, sir.

Q. In command of her?

A. I was master of the vessel.

Q. Do you remember the day of the collision; you recall that day, do you?

A. I recall the day, but I don't recall the date.

Q. What type of vessel is the "Necanicum"?

(Deposition of Austin Keegan.)

A. She is a lumber carrier, termed on this coast a steam schooner. [101]

Q. Was she carrying on that day any lumber?

A. No, sir; we were bound north for a cargo.

Q. Was her draft forward and aft?

A. Her draft aft was about 16 feet; forward about two feet, I would judge.

Q. Do you remember the exact figures, whether it was two or three or four, or what?

A. Well, our figures are put down when we leave the dock.

Q. Do you remember exactly what they were that day?

A. At the time we left the dock she was drawing 16 feet aft and two feet forward.

Q. Is that the usual condition for her to be in?

A. That is her usual condition.

Q. What was the condition of the sea on the afternoon of the day of the collision? A. Smooth.

Q. Any wind? A. Very light southerly wind.

Q. Was the wind sufficient to affect in any way the movement of the vessel?

A. It would not affect the vessel at all.

Q. When did you first see the "Beaver" on that afternoon?

A. Well, I would say somewhere around two o'clock; in that neighborhood; probably before that.

Q. Where was she then?

A. She was one point on our starboard bow; distant about 5 miles, I would judge, roughly.

Q. What was the condition of the weather prior

(Deposition of Austin Keegan.)

to that time? A. Foggy.

Q. You saw her a distance of 5 miles; the fog had lifted then?

A. The fog had lifted at the time I saw the vessel.

Q. What did you do then?

A. My vessel continued on her course when I left the bridge.

Q. Did the fog set in again?

A. Not at that time.

Q. Later on?

A. Shortly before the collision it set in. [102]

Q. When did you next see the "Beaver"?

A. About somewhere around 2:20, I would judge.

Q. Where were you when you next saw her?

A. I was on the starboard after-deck of the "Necanicum."

Q. Where had you been just before that?

A. In the toilet.

Q. Where is that situated?

A. On the starboard after-deck.

Q. Where was the "Beaver" when you then saw her with reference to your vessel?

A. When I again saw her she was on our starboard bow.

Q. Whereabouts on the starboard bow, how many points about? A. About two points.

Q. Can you see from where you stood on the "Necanicum" as you come out of the toilet dead ahead of the "Necanicum" looking forward?

A. No, sir; you cannot see dead ahead.

Q. What is the reason for that?

(Deposition of Austin Keegan.)

A. Well, you are not on the bridge; the "Necanicum's" bow is high out of the water, and you cannot see ahead of what we might term the poop deck, but you can see any vessel, or land or anything else on the starboard side of the vessel.

Q. What did you do when you saw the "Beaver"?

A. I went on the bridge.

Q. Were any signals blown from your vessel to the "Beaver"?

A. When I arrived on the bridge my first officer blew two blasts to the "Beaver."

Q. What, if any, orders were given from your first officer?

A. I heard my first officer say, "Starboard your helm."

Q. What was done then, or what did you see then?

A. I saw the "Beaver" alter her course sharply across my bow.

Q. What did you do then?

A. I ordered the helm hard aport, and backed the vessel full speed astern; backed my vessel full [103] speed astern. I gave three blasts of my whistle to indicate that I was going full speed astern, or, in other words, that my engine was reversed.

Q. How long was it between the time that the order was given to starboard the helm to your order hard aport with the reversing?

A. Well, at a rough estimation I would say about 10 seconds; that is a rough guess.

Q. Was it any considerable lapse of time, Captain?

(Deposition of Austin Keegan.)

A. No considerable lapse of time; just a rough guess.

Q. Had you in the interim seen the vessel turning to her starboard?

A. I saw the vessel swing sharply across my bow; our vessel's bow.

Q. Did she ever get clean across your bow prior to the collision?

A. Well, I would say she was on an angle of about with our keel, I would say 50 degrees across our bow when she struck. Prior to the time of the collision both vessels, I presume, were backing; mine was backing.

Q. What is the effect on your vessel if reversing full speed astern while the vessel is still going ahead under her previous momentum; which way does your vessel turn?

A. She will carry headway a short length of time after reversing the engines; then her bow will swing to starboard.

Q. What sort of wheel have you, a right-hand or left-hand? A. Right-hand wheel.

Q. I am speaking now of the propeller.

A. A right-hand propeller.

Q. As I understand it, then, when you first saw the "Beaver" she was two points on your starboard bow. You thereafter saw her turning to cross your bow?

A. When I first saw the "Beaver" she was about five miles distant one point on [104] our starboard bow.

Q. The second time you saw her?

(Deposition of Austin Keegan.)

A. The second time I saw her she was two or more points on my starboard bow; two points I would roughly say, in that neighborhood.

Q. Then you say she began to swing across your bow. Then came the order porting your helm and reversing full speed astern?

A. We saw the "Beaver" on our starboard bow. When I came out of the toilet I saw the whole starboard side of the "Beaver" plainly. I then went on the bridge and as I was approaching the bridge the first officer gave two blasts of his whistle to the "Beaver" of the "Necanicum's" whistle. I then saw the "Beaver" alter her course sharply across our bow; she answered our two blasts with one; I backed my vessel full speed astern and ordered my helm hard aport.

Q. Had your vessel gained sternway before the collision?

A. My vessel had gained sternway about—she had gained sternway about 45 seconds prior to the collision.

Q. You say the vessel struck at an angle of how many degrees?

A. I would say about 45 or 50 degrees across our bow; about 50 degrees, I would say.

Q. What was the effect; was there any considerable shock?

A. There was considerable shock; my vessel was driven astern hard enough to knock me down, and every man on the vessel that was not holding on to something was knocked down. My vessel went astern

(Deposition of Austin Keegan.)

fast enough to twist her rudder stock off and she took the wheel out of the man's hand, the man at the wheel.

Q. Was there any permanent injury to the steering gear?

A. There was; her steering gear was crippled.

Q. To what extent?

A. Her tiller was bent so that we [105] could not steer the vessel; her rudder stock was twisted almost off, and had there been any rough weather at the time we would have been in a helpless condition.

Q. You say that your vessel was driven back. What speed would you say the "Beaver" had at the time of the collision?

A. Well, I was not in a position to know, but I could see she had a wave on her bow and would estimate her speed about seven or eight knots.

Q. Did she ever stop?

A. She never stopped; she never stopped her headway; I don't mean to say that she did not stop on the ship, that is stop her engines, but I mean to say her headway never stopped.

Q. After the collision, what did she do?

A. She went on about her business.

Q. How soon did she disappear?

A. I would say somewhere around three or four minutes; three minutes afterwards, in that neighborhood, she was out of sight in the fog.

Q. The fog had come down again?

A. The fog had settled down; she continued on her way as far as I know.

(Deposition of Austin Keegan.)

Q. Did she make any inquiry of you as to your condition? A. She made no inquiry whatever.

Q. After she passed on did she ever turn around towards you?

A. Made no turn at all; continued on her course.

Mr. DENMAN.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. What was the course of the vessel as you observed it to be when you first saw her?

A. She appeared to be on a parallel course with mine.

Q. How close did you think she would pass to you?

A. When I first saw her I figured she would pass about a mile to the [106] starboard of us; that is, of us.

Q. Why do you say she was on a parallel course to you if you saw her first bearing a point on your starboard bow?

A. I figured I saw the vessel about five or six miles off bearing one point on the starboard.

Q. Would that indicate to you she was on a course that was parallel to yours?

A. Yes, sir, it would.

Q. Where had you taken your last bearing?

A. What?

Q. Where had you taken your last bearing, the last bearing you had that day before the collision?

A. Point Reyes.

Q. What time of day did you pass there?

A. Well, I have forgotten just the hour.

(Deposition of Austin Keegan.)

Q. Where is your log-book?

A. It is aboard the "Necanicum," I presume.

Mr. CAMPBELL.—Has that bridge log been produced yet?

Mr. DENMAN.—You have not demanded the bridge log.

Mr. CAMPBELL.—Yes, I have several times.

The WITNESS.—The log is aboard the vessel.

Mr. CAMPBELL.—I desire to see the bridge log of this vessel.

The WITNESS.—I presume the bridge log is still aboard the vessel.

Mr. DENMAN.—Q. Did you have anything to do with the bridge log?

A. Nothing whatever, only just to verify it, the same as in all steamers.

Q. That is your log-book?

A. San Pedro towards Eureka; of course, the voyage has nothing whatever to do with this. This is Wednesday the 29th of October. What has the bridge log to do with the ship's log; besides they copy the bridge log in. [107]

Mr. CAMPBELL.—Q. You say you took your last bearing at Point Arena.

A. Point Reyes.

Q. Do you recall what the bearing was?

A. As I remember it was foggy off Point Reyes and I sounded to find the distance off hearing the whistle, getting my position by sounding.

Q. What distance did you say you passed off Point Reyes?

(Deposition of Austin Keegan.)

A. By sounding, I think it was somewhere between a mile and a mile and a half; somewhere about two miles roughly judging. 37 fathoms of water I think I had on a cast of the lead. You can see it there, though. See what the cast was. "Cast lead 38 fathoms of water. 8:40 lead 27 fathoms of water Point Reyes whistle abeam 27 fathoms." Now, have you a chart? We can tell 27 fathoms off Point Reyes by a chart easily.

Q. What distance do you estimate that to be?

A. This cast was 37 fathoms. Here is a note of my own, "37 fathoms of water off Point Reyes." There is a note; that is my own handwriting right there. "Note, this cast was 37 fathoms. A. K. Master." That is my own handwriting.

Q. What does the previous sounding mean?

A. That was a mistake; I took the sounding myself; the man on the bridge misunderstood me and put down 27 instead of 37, you see.

Q. When did you make this notation?

A. At the time I always sign the log.

Q. Who wrote this log up we have before us?

A. The first officer, Mr. Beckwith.

Q. And you subsequently changed it by putting in that note. "Note this cast was 37 fathoms"?

A. This, I think, was in the first mate's hand. We will have to have the pilot-house log-book to know who put down that 27 instead of 37. [108]

Q. What course did you steer north of Point Reyes? A. Northwest half west magnetic.

Q. And you estimate your passing distance off

(Deposition of Austin Keegan.)

Point Reyes about a mile?

A. It is more than that; that would be two miles. We can see here, 37 fathoms off Point Reyes is about two miles off, in that neighborhood.

Q. What is 27 fathoms?

A. That is closer in.

Q. How much? A. Oh, I cannot say.

Q. What is your judgment, Captain?

A. Oh, probably three-quarters of a mile, roughly.

Q. When you saw the "Beaver," I understand she bore about a point on your starboard bow and you judged she would pass you a mile inside of you?

A. Yes, sir.

Q. At that time you were on the bridge?

A. Yes, sir.

Q. How did you happen to be on the bridge then?

A. Owing to the fact it had been foggy all the morning.

Q. What speed had you been running in that fog during the morning?

A. Going about seven and a half or eight knots.

Q. The telegraph was set at full speed all the time, was it not?

A. Yes, sir; the telegraph was at full speed, but we had an understanding with the engineers always that when fog set in that they were to cut her down so that—

Q. (Intg.) Did you give them any orders on this particular day to cut them down? A. I had.

Q. On this particular day you had?

A. Yes, sir.

(Deposition of Austin Keegan.)

Q. How did you communicate your orders?

A. By whistle from the bridge.

Q. By whistle from the bridge?

A. Telephone from the bridge, telephone tube.

Q. What did you say to them?

A. Foggy, and to keep her [109] so she would not pop when we stopped the vessel. You did not get my meaning. The standing order on the "Necanicum" was this: in foggy weather when we start to blow fog-whistles they were to cut the steam down so if I stopped the vessel immediately that the vessel would not pop; that is, her safety valve would not break while we were listening for a blast of another vessel, and that order had been carried out all the time I was master of that ship.

Q. How much reduction in steam pressure would that mean?

A. I do not really know; I am not an engineer.

Q. If those were the standing orders why did you give a special order this day?

A. Just saying it was thick fog and to comply with the orders I had given sometime before that.

Q. Have you a distinct recollection of having telephoned down to the engine-room and having given that order this day? A. I have.

Q. In view of the fact you had given standing orders?

A. Somewhere about 10 o'clock I had whistled down and told them it was foggy, getting foggy; it looked as though it was going to get foggy and not to press her too hard.

(Deposition of Austin Keegan.)

Q. Had you given any orders subsequent to 10 o'clock in the morning? A. No, sir, I had not.

Q. How would the man in the engine-room know it was foggy or not?

A. He would know by hearing the whistle.

Q. By hearing the whistle? A. Yes, sir.

Q. And he was supposed to control himself by that whistle?

A. Yes, sir, of course; unless he was told otherwise.

Q. He was not told otherwise after 10 o'clock in the morning?

A. He was told at 10 o'clock. [110]

Q. I said after? A. It was not necessary.

Q. Was it thick fog from 10 o'clock on?

A. It was.

Q. Up to what time?

A. Two o'clock along about that neighborhood.

Q. Two o'clock? A. Yes, sir.

Q. Why did you pull your lookout off the fore-castle head about 2 o'clock then?

A. Because the weather had cleared up.

Q. Is it not your custom to maintain a lookout on the forecastle-head at all times?

A. In a bright day like?

Q. Yes. A. No, sir.

Q. You do not do it?

A. No, sir; it is not necessary.

Q. How long had you had your lookout off the forecastle-head?

A. Probably about 10 or 15 minutes.

Q. Did you send him back yourself or did the first

(Deposition of Austin Keegan.)

officer? A. The first officer.

Q. Where was he in the meantime?

A. The lookout?

Q. Yes.

A. I don't really know; probably he was taking a walk around the deck.

Q. Don't the rules of the road require you to maintain a lookout all the time A. No, sir.

Q. They do not? A. No, sir.

Q. That is the way you navigate your vessel?

A. Yes, sir.

Q. How long did the "Beaver" remain in sight after you first saw her before the fog had again shut in?

A. Oh, probably about—when I myself saw her?

Q. Yes.

A. You are speaking of how long I had seen her?

Q. How long did you keep her in sight?

A. I had seen her about five minutes or so.

Q. At the time you first saw her you did not have a lookout [111] on the forecastle head?

A. Yes, sir.

Q. I thought you had pulled him off when the fog raised?

A. Yes, sir, the lookout was on the forecastle head when we first saw the "Beaver."

Q. You pulled him off after that?

A. The fog had cleared up.

Q. You pulled him off after that?

A. He was told it was not necessary to keep a lookout any longer.

(Deposition of Austin Keegan.)

Q. Who told him? A. The mate, I presume.

Q. You said that was done; have you any knowledge about it?

A. I do not know whether he came off the lookout, or not.

Q. Why did you say just now the mate told him?

A. I say when I left the bridge the fog had cleared up and there was no lookout necessary; the weather was clear.

Q. Do you know whether or not there was a lookout on there at the time? A. Which time?

Q. At the time you saw the "Beaver"?

A. The lookout was on the forecastle-head at the time I sighted the "Beaver."

Q. Was he there when you left the bridge?

A. Yes, sir.

Q. So you do not know whether he was pulled off or not? A. I do not know.

Q. You do not know whether the mate told him there was no necessity to keep a lookout?

A. That was the mate's orders.

Q. I say you do not know?

A. I do not know whether he came off the lookout, or not.

Q. You examined the mate's statement before he handed it in to the Inspectors? A. I did not.

Q. Did you file a statement with him?

A. I filed a statement with the Inspectors.

Mr. CAMPBELL.—Have you copies of those statements [112] Mr. Denman?

(Deposition of Austin Keegan.)

Mr. DENMAN.—Yes, have you not copies?

Mr. CAMPBELL.—No. I should like to see the mate's also.

Mr. DENMAN.—I cannot find it. I was looking for it.

Mr. CAMPBELL.—You had it the other day.

Mr. DENMAN.—If it is not here we can get the Inspector's

Mr. CAMPBELL.—I will ask that this cross-examination be continued until the bridge log is furnished.

The WITNESS.—It is on the ship yet, I think.

Mr. CAMPBELL.—Q. When are you going to sea, Captain? A. I really do not know.

Q. You are ashore now? A. I am.

Q. Out of the "Necanicum?"

A. Yes, sir; in other words, I was discharged.

Q. Will you be here in the morning

A. If you wish.

Mr. CAMPBELL.—I would like to have him go, Mr. Denman, until you get the bridge log.

Mr. DENMAN.—That is all right; don't you want to go on with your examination and get what you can in. I don't imagine there will be much in the bridge log for you.

Mr. CAMPBELL.—You have seen the bridge log and I have not.

Mr. DENMAN.—No, I have not.

The WITNESS.—This is a copy of the bridge log you have right here.

(Deposition of Austin Keegan.)

Mr. CAMPBELL.—I have asked for the bridge log.

Mr. DENMAN.—I think you are mistaken.

Mr. CAMPBELL.—The record will show.

Mr. DENMAN.—My recollection is that you requested the log and we gave you this, and you made no demand for the [113] bridge log.

Mr. CAMPBELL.—To end the dispute, I will ask the Reporter to produce his notes in the morning and see if I have not asked for the bridge log, and did not expressly say I could not finish my cross-examination of the first officer until that log was produced.

Mr. DENMAN.—You will find you are mistaken according to the record. I am perfectly willing to get it for you.

Mr. CAMPBELL.—I shall ask that the hearing be adjourned until to-morrow so that the log can be furnished.

Q. How much had the “Beaver” changed in her bearing in the interim between the time you first saw her and the time you left the bridge?

A. How much had she changed in her heading from the time I first saw her until the time I left the bridge?

Q. Yes.

A. I would not say how much she had changed her heading; I would say she had changed her bearing. How much I would not say.

Q. How long was it after you left the bridge before you again saw her?

(Deposition of Austin Keegan.)

A. Oh, somewhere around probably 12 minutes perhaps, in that neighborhood; I would not say for sure; somewhere around there.

Q. When you saw her the next time did you find her where you expected she would be from what you had seen of her when you left the bridge?

A. When I next saw her I saw her on my starboard bow; I saw her whole starboard side and she appeared to be a little closer than she should have been, but there was plenty of room to pass.

Q. I will again ask you the question. When you saw her the second time was she in the position you expected to find her [114] bearing in mind the position you had last seen her when you left the bridge? A. I have answered that question.

O. Answer it again.

A. She was a little closer.

Q. How much closer?

A. I would say—what do you want, in miles or feet?

Q. Whichever way serves your purpose best?

A. I would say she was closer than I expected to find her.

Q. In your judgment then when you came out of the lavatory you thought she had altered her course?

A. I thought she had.

Q. And swung towards you?

A. It struck me she must have in order to get that close to me. However, when I saw her after I came out of the lavatory I saw her whole starboard

(Deposition of Austin Keegan.)

side more than half a mile off.

Q. That was more than half a mile to starboard to you? A. To the starboard of me.

Q. And how far ahead of you?

A. Bearing about two points I would safely say.

Q. At what distance ahead?

A. I just said half a mile or more.

Q. How far to starboard would you say, half a mile?

A. I would roughly guess about that; more.

Mr. DENMAN.—I want to ask counsel what he means by “how far to starboard?”

Mr. CAMPBELL.—My question was understood. The witness does not need to wink to his counsel either.

The WITNESS.—You asked me that question three or four times over and you do not give me a chance to answer the question.

Mr. CAMPBELL.—I will give you all the opportunity you [115] want.

The WITNESS.—I am telling you the truth in this matter and nothing but the truth.

Mr. DENMAN.—What does counsel mean by half a mile to starboard. Do you mean by that half a mile abeam of the vessel or off; I really do not know.

The WITNESS.—I do not know what he means either.

Mr. CAMPBELL.—If counsel makes another suggestion to the witness perhaps the witness will follow up the suggestion again.

The WITNESS.—I want—

(Deposition of Austin Keegan.)

Mr. DENMAN.—(Intg.) Let him put the question and you answer it.

The WITNESS.—I want to answer that last question this gentleman asked me. How far would she pass me if she had continued on her course. She would have passed me half a mile or probably more had she continued on her course.

Mr. CAMPBELL.—Q. Perhaps a mile?

A. Perhaps nothing; a half a mile or more; I would say; not a mile.

Q. Three quarters of a mile. What would you say about the judgment of your first officer, that she would pass three-quarters of a mile?

Mr. DENMAN.—I object to the question as calling for the opinion of the witness.

A. Perhaps his notion of distance and mine are probably different.

Q. You would not say she would not have passed you three-quarters of a mile distant?

A. I would say she would have passed one-half a mile had she continued on her course. [116]

Q. Why did you say a little while ago she would have passed you one-half a mile or probably a little more?

A. Owing to the fact I cannot judge half a mile; if I wanted to lay off half a mile in San Francisco I would take a tape measure and measure off and drive a stake and I would say one-half a mile.

Q. So in your judgment at the time you came out of the lavatory this vessel was one-half a mile ahead

(Deposition of Austin Keegan.)

of you and about half a mile to the starboard of you?

A. Roughly.

Q. That is your best judgment, is it not?

A. Yes, sir, roughly. Don't put down half a mile; I say roughly; in water we do not take a tape-line and measure the distance.

Q. You are giving me your best judgment?

A. I am.

Q. Do you want to change it from one-half a mile?

A. I do not want to change my statement whatever.

Mr. DENMAN.—I suggest that the captain plot it.

Mr. CAMPBELL.—Q. Did you rush on to the bridge at that time? A. I went on the bridge.

Q. Why?

A. Well, just to be on the bridge, that was all.

Q. Why; what was the necessity of it?

A. Owing to the fact that our vessel was blowing fog-signals.

Q. At that time? A. Yes, sir.

Q. Was it foggy then? A. It was.

Q. What had your vessel been doing with respect to blowing fog-signals while you were in the lavatory? A. Blowing fog-signals.

Q. Was it foggy again at that time?

A. Shortly after I went in the lavatory I heard my fog-signals blowing. [117]

Q. Could you see from the lavatory whether it was foggy or not? A. I could.

Q. And ascertained it was?

A. I heard the whistles blowing. The fog had

(Deposition of Austin Keegan.)

shut in during the time I was in the lavatory.

Q. When you came out of the lavatory was it still foggy? A. It was.

Q. How soon after you came out of the lavatory did the fog lift so you could see the "Beaver"?

A. It was so foggy I could not see the "Beaver."

Q. Where were you when the two blasts were blown between the vessels as approaching signals?

A. I was approaching on the bridge.

Q. Where is the lavatory, on the poop deck? ?

A. On the starboard side on the poop deck.

Q. Aft the cabin? A. Aft the bridge.

Q. Have you a cabin deck besides your main deck?

A. No, sir.

Q. Where are her houses on deck?

A. Main deck and poop deck raises above the main deck.

Q. Is the poop deck level with the bridge?

A. No, sir, it is lower.

Q. Then you were on a deck lower than the bridge when you were at the lavatory? A. I was; yes.

Q. You say you heard an answer to your two whistles, you hearing one whistle from the "Beaver"? A. I did.

Q. Distinctly?

A. I heard the blast of the whistle.

Q. You had no difficulty in hearing it?

A. None whatever.

Q. Had you heard any fog-whistles from the "Beaver" while you were in the lavatory?

A. None at all. [118]

(Deposition of Austin Keegan.)

Q. Are you familiar with the "Beaver"; are you acquainted with her?

A. I know her by sight, but I seen the name on her.

Q. You would not know her otherwise?

A. No, sir.

Q. How long have you been sailing up and down the coast. A. About 20 years.

Q. Have you been on the coast in the last four or five years in the trade from the Columbia River south? A. Yes, sir.

Q. And yet you would not know the "Beaver" by sight unless you saw her name? A. No, sir.

Q. Do you know either the "Beaver" or "Bear" sight unless you saw her name? A. No, sir.

Q. They are two of the largest steamers on the coast? A. They are quite large vessels.

Q. Do you know whether or not they are equipped with automatic fog-horns?

A. I do not know. I have heard that the "Beaver" was equipped with an automatic fog-whistle.

Q. Did you run to the bridge or walk to the bridge after you left the lavatory?

A. I went on the bridge.

Q. Did you run or walk?

A. You have to climb the steps, you know and when you get up, I do not know whether you call it running or walking, but I got there.

Q. Were you in haste to get on the bridge?

(Deposition of Austin Keegan.)

A. No great particular haste; no.

Q. It was not until after you got on the bridge that you saw the "Beaver" alter her course as you have described it?

A. I have not said that the "Beaver," or anything about the altering of the "Beaver's" course, as far as I know.

Q. I thought you testified a little while ago that the "Beaver" altered her course sharply across your bow?

A. That [119] was after I got on the bridge.

Q. That is it?

A. I told you that some little time ago.

Q. I do not recall?

A. You must have it down there.

Q. There can be no mistake about that, you did not see her alter the course until you got on the bridge?

A. I told you distinctly I saw the "Beaver's" starboard side.

Q. Were you on the deck or not at the time you saw the "Beaver" alter her course?

A. I was approaching the bridge when Mr. Beckwith blew the two blasts to her.

Q. Where were you when you saw the "Beaver" alter her course?

A. I was on the bridge at the time she pulled herself across our bow, and then gave me one blast.

Q. Did she alter her course before or after she gave you the one blast?

(Deposition of Austin Keegan.)

A. She altered her course about the time she gave me the one blast.

Q. Then you were on the bridge at the time you heard the one blast? A. I certainly was, yes.

Q. Where were you at the time that the two blasts were given by your chief officer?

A. Approaching the bridge.

Q. Do you know whether or not he had given his order to the helmsman to starboard his helm before or after the two blasts?

A. On our vessel. I heard him give the order.

Q. Was that before or after the two blasts?

A. About the time he gave the two blasts; about that time.

Q. Where were you then?

A. Approaching the bridge.

Q. How far distant from the bridge?

A. Two or three feet, I suppose; I did not measure the distance.

Q. Was that order obeyed by the helmsman?

A. I presume it was. [120]

Q. You knew it was, didn't you?

A. I could not see the helmsman.

Q. You could tell by the movement of your vessel, could you not? A. No, sir.

Q. You could not tell? A. No, sir.

Q. How soon after you reached the bridge did you give the order to hard aport?

A. I gave the order hard aport when the "Beaver" gave me one blast of his whistle.

(Deposition of Austin Keegan.)

Q. How soon was that after the mate had given his order to starboard the helm; you say about 10 seconds?

A. Well, I could not say within seconds; probably some seconds might have elapsed, I would not say—a few seconds.

Q. And you did not give your order to port your helm until after? A. Until he blew one blast?

Q. Yes. A. Yes, sir.

Q. And you gave your order to port your helm about the time that the “Beaver” altered her course, did you not? I was not on the “Beaver.”

Q. You could see, could you not?

A. I could not tell what time he gave his order to alter his course.

Q. I say you gave the order to port your helm about the time the “Beaver” altered her course?

A. I could not say.

Q. Why not?

A. I do not know when the “Beaver” altered her course.

Q. Could you not see?

A. I was not on the “Beaver.”

Q. Could you not see the “Beaver” and tell when she altered her course?

A. I could see the “Beaver.”

Q. Could you tell when she altered her course?

A. That is pretty hard to say. One blast changed his course. [121]

Q. Was that when he started to change his course?

(Deposition of Austin Keegan.)

A. It appeared to be in that neighborhood.

Q. So that you ordered your helm hard aport when he gave you one blast which was practically the same time that he started to change his course?

A. When he gave the one blast and changed his course I backed my ship full speed astern and gave him three blasts.

Q. Is that what I asked you?

A. No, sir, it is not, but you asked it before.

Q. Go back again. Did you alter your helm to port before you saw a change of course on the "Beaver"? A. No, sir.

Q. Then you ordered your helm to port at the time you saw the "Beaver" starting to swing to starboard, did you not?

A. I ordered my helm aport when he gave me the one blast.

Q. Was he already swinging when he gave you the one blast, or did he appear to be swinging at that moment?

A. He appeared to be swinging at that moment, when he answered my whistles. In other words, when he cross-signalled me.

Q. Had you heard any whistle from the "Beaver" up to that time? A. None at all.

Q. Had you thought it strange she was not sounding her fog-whistle? A. I thought so, yes.

Q. Did you make any comment on that to anybody? A. I did.

Q. To whom?

A. When the collision occurred—

(Deposition of Austin Keegan.)

Q. (Intg.) At what time. When did you make any particular comment that the "Beaver" was not blowing her fog-whistle? A. What time?

Q. When did you?

A. When I came on the bridge I said to the first mate, "Damn funny he don't blow his fog-whistle."
[122]

Q. You expected him to blow his fog-whistle although in sight of your vessel? A. Yes, sir.

Q. Were you blowing your fog-whistle?

A. We certainly were.

Q. Did you notice how far your vessel swung on your hard astarboard helm the mate had given her?

A. She did not have time to swing more than, I would say, half a point or so.

Q. How long would it take to swing half a point in that size vessel?

A. Probably, maybe 15 seconds or somewhere in that neighborhood; I would not say for sure; the conditions of weather and so forth.

Q. How soon did the collision take place after you reached the bridge?

A. Probably something over two minutes.

Q. Probably something over two minutes?

A. Yes, sir.

Q. Was your vessel going astern three or four knots an hour at the time of the collision?

A. She was going astern.

Q. Is that a fair answer to my question, Captain?

A. It is.

Q. She was going astern three or four knots an

(Deposition of Austin Keegan.)

hour? A. She was going astern.

Q. Was she going astern three or four knots an hour? A. I would not say.

Q. You do not know?

A. I would not say how fast she was going astern.

Q. Is that because you do not know?

A. Not because I do not know, because I have not experimented with the ship.

Q. What is your judgment about it, as to whether or not she was going three or four knots an hour astern?

A. At that particular time I would say she was going astern— [123] I could not give you the speed astern; she was going astern.

Q. She did not have any appreciable stern way that you could see? A. She had.

Q. She had appreciable sternway?

A. Yes, sir. We had no means of knowing she was going astern.

Q. What was the speed astern at the time of the collision? A. That I cannot say.

Q. Is it because you cannot, or you do not want to?

A. I would not say.

Q. In your judgment the collision took place in about two minutes after you reached the bridge?

A. A little over two minutes; something over two minutes.

Q. How long a time elapsed between your two whistle signal and the one whistle you say you received from the "Beaver"?

(Deposition of Austin Keegan.)

A. Oh, some few seconds; a short interval; I would not say.

Q. Is there any way, captain, you can account for a master of a passenger ship 450 feet in length in weather so clear that you can observe at least a distance of half a mile changing his course so as to cut sharply across you bow, when he was proceeding on a course which would pass you one-half a mile distant? A. For whom do you say?

Q. Read the question, Mr. Reporter.

(The Reporter reads the question.)

A. A master you said?

Q. Yes.

A. I do not think that any sensible man going to sea would have done what was done on the "Beaver."

Q. Is that your answer?

A. I don't think the master of the vessel was on his course.

Q. Do you know anything about him?

A. I don't know him on the street. [124]

Q. Is there any reason you can give for the navigating officer of a large passenger ship altering his course so as to cross the bow of another vessel when he is proceeding on a clear day so as to pass one-half a mile distant?

A. I cannot give any reason why he should do such a thing, the master, or mate, or any other man that holds a license.

Q. It would be a most extraordinary occurrence?

A. It would; I would not say extraordinary, I have seen them do a great many funny things. I

(Deposition of Austin Keegan.)

consider it a foolish thing to do.

Q. Have you ever sailed in a vessel of the type or size of the "Beaver"?

A. I have never sailed on a passenger vessel of her size, but I have sailed on some other large vessels carrying freight.

Q. Have you ever sailed on vessels up and down the coast of the size of the "Beaver"? A. No, sir.

Q. Have you ever been an officer on a vessel of the size of the "Beaver"?

A. Not a passenger carrier.

Q. You know it to be a fact that those large vessels hold their courses as close as they can?

A. I do not know they do.

Q. Has not that been your experience that those large vessels do?

A. I cannot say owing to the fact I have not been in the "Beaver."

Q. From your experience don't they adhere to their courses as much as possible?

A. I cannot say.

Q. Have you ever made any observation?

A. I comply with the rules regardless of the size of ships.

Q. Have you ever made any observation as to whether those large vessels adhere to their courses?

A. I have nothing to do with them, the sea is clear to all regardless of the size of [125] the ship. The size of the vessel cuts no ice. My license covers as big a ship as the "Beaver" and a great deal larger. What they do and what they don't do, I do not care. I comply with the rules of the road.

(Deposition of Austin Keegan.)

Q. Were you on the bridge when the lookout was ordered back to the fore-castle-head?

A. I don't know that the man left the fore-castle-head.

Q. You mean to tell me you did not see the statement that was filed by your chief officer with the United States Inspectors detailing the circumstances of the collision?

A. I saw no statement that the first officer filed whatever. Furthermore I will tell you I am at outs with the first officer and I do not want to see his statement.

Q. Why are you at outs with him?

A. Just on general principles.

Q. Arising out of this collision?

A. No; nothing whatever to do with the collision.

Q. You have not very much confidence with the first officer?

A. I have every confidence in him, a first-class man.

Q. You would not doubt his statement he made to the inspectors?

A. I would not doubt his statement at all.

Q. Made to the inspectors?

A. I do not know what his statement is; his statement to the inspectors was aside from mine.

Q. In your statement to the inspectors you did not go into the circumstances of the collision at all?

A. I gave the cause.

Q. Did you give the circumstances that led up to the collision?

(Deposition of Austin Keegan.)

A. I gave the cause of the collision.

Mr. CAMPBELL.—I offer in evidence the statement of the [126] master.

(The paper is marked "Libelant's Exhibit 3," and is as follows:)

Libelant's Exhibit No. 3—Statement of Austin Keegan, Master of S. S. "Necanicum."

"Steamer 'Necanicum,'

San Francisco, Oct. 31, 1913.

U. S. Inspectors,

Steamboat Inspection Service,

San Francisco, Calif.

Gentlemen:

I report as follows: At 2.18 P. M. the 30th inst. when 45 miles northward of Pt. Reyes on her way to Humboldt Bay, the S. S. 'Necanicum' collided with the S. S. 'Beaver.' The weather was foggy at the time. The 'Necanicum' had her stem damaged and her tiller bent.

The collision was due to the fact that the 'Beaver' was not sounding her fog signal and also that when both vessels were in sight and hearing of each other the 'Beaver' cross signaled the 'Necanicum.'

Respectfully yours,

AUSTIN KEEGAN,

Master S. S. 'Necanicum.' "

The WITNESS.—Mr. Beckwith's statement was independent of mine altogether.

Mr. CAMPBELL.—Q. Didn't he tell you he ordered the lookout back to the fore-castle-head after you had first seen the "Beaver"?

(Deposition of Austin Keegan.)

A. My answer to that will be this: I saw the lookout on the forecastle-head when I came on the bridge; he was standing there.

Q. Did the chief officer tell you he had ordered the lookout back to the forecastle-head after he had first seen the "Beaver"? [127]

A. I seen the lookout on the forecastle-head when I came on the bridge.

Q. Answer my question.

A. When was this? What are you asking me?

Q. Read the question.

(The Reporter reads the question.)

A. What are you asking me. He had first seen the "Beaver" in clear weather.

Q. At any time did the chief officer of your vessel, Mr. Beckwith, tell you he had ordered the lookout back to the forecastle-head at a time subsequent to when he first saw the "Beaver"?

A. Yes, sir, I think he told me that sometime, I would not say; yes, he told me that.

Q. Then you knew from that statement that he had pulled him off the forecastle-head?

A. I know the man was on the lookout when I came on the bridge.

Q. You knew then that he had been pulled off?

A. I do not know that he had. When I left the bridge he was on the lookout and when I came back on the bridge he was still there; whether he had been taken off in the meantime I would not say. I would not swear to that. I know he was on the lookout when I left the bridge, when the fog cleared up.

(Deposition of Austin Keegan.)

What he had done in the interval before the fog set in I do not know; that is, the lookout. I know he was on the lookout when I came back on the bridge. And now that I think of it—let me see, he was on the lookout, of course he was. He was on the lookout for some time.

Q. What did you say would be the course that the bow of your steamer would take when you reversed at full speed astern under [128] a hard aport helm where that helm had been ordered from a hard astarboard helm?

A. She had headway. What do you mean, after the engines were reversed?

Q. Read the question, Mr. Reporter. (The Reporter reads the question.) If your vessel was proceeding under a starboard helm and you suddenly reversed her full speed astern with your helm hard aport, what would be the course that your vessel would swing to?

A. Well, she would continue as she headed at the time the engines were reversed.

Q. That is to say, she would continue to swing to port if she had a starboard helm?

A. She would continue as she headed at the time the engines were reversed for probably two or three seconds and then her bow would swing to starboard, to the right.

Q. Would her bow swing to starboard before she gained sternway? A. It would.

Q. Has that been your experience?

A. It would a little.

(Deposition of Austin Keegan.)

Q. What do you mean by a little?

A. Well, a little is a little.

Q. When would she swing this little, just before she gained sternway?

A. Why, certainly before she gained sternway; yes.

Q. How long would she continue to swing to port if she was under a starboard helm at the time you reversed her?

A. I just stated that she would stay as she headed for a little while and then she would begin to swing to starboard.

Q. If she was under a starboard helm she would continue swinging to port for a time then?

Mr. DENMAN.—He said continue as she was headed, not as she was swinging. [129]

A. She might probably a quarter of a point; somewhere like that.

Q. If she was swinging to port at the time under a starboard helm she would continue to swing to port for an appreciable time?

A. She would for a couple of seconds.

Q. Is that all?

A. She would for a short interval.

Q. Have you ever experienced with that steamer to see how quick you could stop her? A. I have.

Q. How long did it take you?

A. It took one minute and 15 seconds to stop her headway and I tried it here in San Francisco Bay at full speed ahead and then I gave full speed astern

(Deposition of Austin Keegan.)

with everything popping and she had sternway for 45 seconds.

Q. Within 45 seconds?

A. Her headway had stopped in one minute and 15 seconds and the other 45 seconds she was going astern. It took one minute and 15 seconds in smooth weather in this bay going about eight miles an hour.

Q. That is her full speed?

A. Full speed ahead to full speed astern.

Q. That is about the full speed of that vessel, eight miles?

A. That is her limit, unless you set sail on her and drove her before a heavy northwest, and then you might get eight and a half out of her.

Q. Captain, from the time you passed Point Reyes up to the time you first sighted the "Beaver" had you had fog all the time?

A. More or less, yes; banks of fog.

Q. You maintained the same speed right along during that period?

A. Not when the fog was thick.

Q. Why don't your log show the reduction of speed? [130]

A. Well, we have standing orders on the vessel—

Q. This is simply then a presumption on your part or an assumption from your standing orders?

A. My standing orders are always carried out on a vessel strictly.

Q. How did you know they were carried out on this morning? A. I know that they were.

Q. How?

(Deposition of Austin Keegan.)

A. Prior to the time of the collision I had stopped the vessel at different times.

Q. For what purpose?

A. To ascertain the position of some other approaching vessel.

Q. What other vessel?

A. We did not see them in the fog.

Q. Don't you know in the fog when you pass vessels? A. No, sir, we do not know.

Q. How many vessels did you pass that morning?

A. I could not say.

Q. Have you any recollection at all?

A. I would say several.

Q. Why, don't you note in your log when you stop for passing vessels?

A. Well, we just stop the engine—I presume the engineer's log will show that.

Q. Why, don't you show it on your log when you stop your engines for fog whistles?

A. It is not customary.

Q. Don't you ever do it?

A. It is not customary.

Q. I am asking you if you don't ever do it.

A. If I was on a fast running vessel I would; on a slow vessel like mine I do not because we do not go too fast at any time. My vessel is a very slow vessel, the slowest on the coast. To continue answering your question I will say how I know that the steam was reduced is when I had stopped the vessel she did not pop; in other words, she did not blow off any steam, whereas if she was going along at full

(Deposition of Austin Keegan.)

speed with the steam [131] turned on if I stopped her immediately she would pop right away; that is, her safety valve would work.

Q. Do you know the size of her boiler?

A. Of the "Necanicum"?

Q. Yes. A. Of the boiler?

Q. Yes.

A. Yes, sir; it is 4 by 4 diameter square piece of iron, and probably about six feet long, I would say.

Q. Did you ever measure it to see if it is 4 by 4?

A. I had a new boiler put in.

Q. Did you ever measure the old boiler?

A. The boiler was 4 by 4 in the rudder head.

Q. That is where it passes through the rudder stock? A. Yes, sir.

Q. What is it outside of that?

A. Outside of that it is 5 by 5, I think.

Q. Did you ever measure it?

A. I had it made to order.

Q. Did you ever measure it?

A. Yes, sir. You mean the boiler?

Q. You know what I mean.

A. It is around 5 by 5 solid iron, just back of the round of the rudder-head. The part that goes through the rudder is 4 by 4, and there is a shoulder that goes against that that is 5 by 5, and then it runs back; the leverage tapers to a point where the shoes connect probably about 5 feet, somewhere in that neighborhood. I did not measure that, but I do know the diameter.

Mr. CAMPBELL.—That is all except I would like

(Deposition of Austin Keegan.)

to have the examination continued over until 10 o'clock in the morning, until the bridge log is produced.

Redirect Examination.

Mr. DENMAN.—Q. Captain, I wish you would take a sheet of [132] paper and draw the relative positions of the two vessels when you saw the “Beaver” two points or more on your starboard bow when you came out of the toilet. A. All right.

Q. Just take that sheet there if you will. I will get you a pair of parallels.

The WITNESS.—We cannot get distances on this; we could on a chart with dividers and parallels. It will give it to you. What is it you wish?

Mr. DENMAN.—Q. I wish you would draw—take some position on there as your position on the ocean roughly, approximately at the time you came out of the toilet.

A. We were heading northwest half west, that is our course at the time.

Q. Mark that line that you have just drawn A—B. Mark it A here and B here. A. Yes, sir.

Q. Now, that line is the course that you were on at the time? A. Yes, sir.

Mr. CAMPBELL.—Q. That is, it is a line drawn parallel to the course that you were on?

A. It is the course.

Q. You were not that far offshore?

A. It is a parallel line to the course that we were steering. This chart is not a new chart.

(Deposition of Austin Keegan.)

Q. I want to show the relative positions of the two vessels?

A. There is our course (indicating).

Mr. DENMAN.—Q. Mark on that course a position for your vessel. A. Any position will do.

Q. Any position will do. Put down there A.

A. This is my ship. (Indicating.)

Q. When you came out of your room you say you saw the other vessel two points on your starboard bow? [133]

A. Yes, sir.

Q. Mark her. A. Yes, sir (marking).

Q. Would you draw that line through your bow, or that far forward, Captain. Take it from the bow of your vessel? A. Yes, sir.

Q. Have you measured that carefully; is that two points?

A. Northwest half west is this. That is parallel.

Q. Now, Captain, take a point on the exact bow of your vessel. I want you to measure off the distance of a half mile on the dividers? A. Yes, sir.

Q. Multiply your exhibit by 10 times and get me a five mile distance on your dividers.

A. A five mile distance on this chart? Q. Yes.

A. Yes, sir.

Q. Mark it on this line. A. Yes, sir.

Q. Mark that the spot C. A. Yes, sir.

Q. That spot which we will call half a mile from the "Necanicum" enlarging the scale for this purpose 10 times. A. Yes, sir.

Q. Mark the line two points starboard of the line

(Deposition of Austin Keegan.)

A—B as the line X—Y. A. Yes, sir.

Q. X—Y then represents the line of position from the bow of your boat to the “Beaver” and the point C is a point one-half a mile distant, drawing the scale as 10 times larger. As I understand it, Captain, you say that when you saw the “Beaver” two points on your starboard bow you presumed that she was on the same course that you were on as you could then see her starboard side. Is that correct?

A. That is correct. [134]

Q. Will you pass a line through the point C parallel to the line B—C?

A. That line is already there.

Q. Pass a line through C which will mark the course of the “Beaver”? A. Yes, sir.

Q. Now, I ask you what distance from the course of the “Necanicum” the course of the “Beaver” is on that scale. We will mark the bow of the “Necanicum.”

A. I will have to go home and look up my algebra.

Q. You don’t need your algebra. Mark the bow of the “Necanicum” N. A. Yes, sir.

Q. Take your dividers and measure the distance between the line T—Q and the line B—C.

A. On this chart?

Q. Yes. What is the distance?

A. It shows two knots.

Q. Dividing it by 10 it will be two-tenths or one-fifth knot, won’t it? A. Yes, sir.

Q. So that the distance from the bow of your vessel to the point C where you first saw the “Beaver”

(Deposition of Austin Keegan.)

is less than one-half and the distance between the course of the "Beaver" T—Q and the course of the "Necanicum" B—C. That is correct, it is not? That is correct on the chart there, is it not?

A. I would not say.

Q. Measure it and see.

A. I would not do it that way.

Q. You have got to follow my mind.

A. I cannot say you are right when I do not know.

Q. I am not asking you to. Just follow this.

A. Yes, sir, I have taken your word for it.

Q. Is not the line N—C a distance of more than two and a half times the distance between the courses of the vessels? A. It is. [135]

Q. Now, if the vessel is two points on your bow when she is half a mile away—

A. (Intg.) Or more.

Q. If she is two points on your bow and half a mile away and continues on that course, on the same course, you are on parallel courses how far will the vessels be apart when they pass one another. Will they be just as far apart as they were distant in the beginning? A. On parallel courses?

Q. Yes.

A. They would not; they will be closer to.

Q. You do not mean to say, do you, that when you see her one-half a mile distant two points on your bow that she will be half a mile distant when she was abeam to you?

Mr. CAMPBELL.—Objected to as leading and cross-examination of his own witness.

(Deposition of Austin Keegan.)

A. I have not said she was.

Mr. DENMAN.—Q. I understood you to say that.

A. All I say is that she had ample room to pass had she continued on her course.

Q. You did say in answer to a question by Mr. Campbell that you saw her one-half a mile distant two points or your starboard bow and then you said afterwards to him that she would pass you half a mile and over on your starboard side from that position on a parallel course. I want to ask you—

A. (Intg.) I never said she would pass me half a mile when she passed me abeam.

Mr. CAMPBELL.—We object to counsel's cross-examination of his own witness. The witness plainly testified as to what his recollection was at that time.

The WITNESS.—I did not say she would pass me half a mile. I said when she was two points she was half a mile or [136] more distant; how much more I would not say. I never did state she passed me half a mile.

Mr. DENMAN.—Q. My impression is the record will show you made such an answer. I would like to know what your opinion was in regard to the distance she would pass you from the position you last saw her as you stepped out of the toilet.

A. I would say she would have passed a good safe distance.

Q. Would it be such a distance as is represented on the chart which we put in here?

A. It should be at least had she continued, she would have passed me at a good safe distance.

(Deposition of Austin Keegan.)

Q. On the inside?

A. Inside of me. I don't remember having stated at any time the vessel passed me half a mile inside of me when she was abeam of me.

Mr. DENMAN.—I offer this in evidence as Claimant's Exhibit 1.

(The chart is marked "Claimant's Exhibit 1.")

Q. This popping you referred to is that customary on vessels on this type when they are under full steam?

A. Yes, sir; it is the slow speed vessels.

Q. With your vessel bearing as she was bearing that day, can you see across the bow of your vessel from the bridge? A. I could from the bridge.

Q. It was only from this deck?

A. I could not see from the lavatory door; I could not see ahead nor could I see on the port bow, but I could see anything that was well to the starboard of us.

Q. Now, Captain, you have given various estimates of time as to what occurred when you came on deck; do you mean to [137] say those estimates are definite as to seconds?

A. I would not want to say they are; I was not taking time.

Q. Have you had experience in attempting to check up the time with the actual facts?

A. If I was running a vessel from one familiar point to another and trying to make it in thick weather, running from one place to another and knew the speed of the vessel I might time her. In

(Deposition of Austin Keegan.)

this case I did not have any watch in my hand.

Q. Is there any difference in the line of the "Beaver" and the "Bear"?

A. I know nothing about either vessel, other than they are large vessels. I do not even know their tonnage. All vessels are alike; the rules of the road do not say what size the vessels shall be or anything else.

Q. What style of steering gear have you on your vessel, hand or steam? A. Hand gear.

Q. And about how long does it take you to put the vessel over? A. To get the wheel over?

Q. Yes.

A. About 18 or 20 seconds I should judge; 20 seconds, perhaps. It depends on who is at the wheel.

Q. On cross-examination Mr. Campbell asked you whether or not the order was starboard or hard astarboard that the mate gave. Do you recall which it was?

A. I heard him give an order, but I would not say which he gave.

Mr. DENMAN.—That is all.

Recross-examination.

Mr. CAMPBELL.—Q. What did you mean by stating to me as my recollection is that you did, that when you first saw the "Beaver" you then judged her to be on such a course that she would pass you about a mile to starboard?

A. I figured she would pass me a mile to starboard.

[138]

Q. That is what you did figure on?

(Deposition of Austin Keegan.)

A. Yes, sir.

Q. The distance between your vessel and the "Beaver" at the time they would pass each other would be a mile?

A. Because she was five or more miles, not in my opinion.

Q. And a point on your starboard bow?

A. And a point on my starboard bow.

Q. Is it not a fact that when you first saw her after you came out of the lavatory that you thought at that time that she was in such a position that she would, if she held her course pass you about half a mile distant?

A. No, sir; I stated that I saw her about two points, in that neighborhood, on the starboard bow, and I saw the whole starboard side of the "Beaver," and I figured that if she carried on as she was going, kept her course, she would pass well clear of us. I did not state at any time how far she would pass us.

Q. You said to me on direct examination in answer to my question she would pass you about half a mile? A. When she was abeam?

Q. Yes. A. See if you can find that.

Q. And you said she would pass perhaps a little more. A. I do not think so.

Q. Had she changed her course in the five minutes which elapsed between the time you first saw the "Beaver" and the time you left the bridge?

A. I would not say five minutes or not. If she did, I don't know; I was not on the "Beaver."

Q. Could you not see her?

(Deposition of Austin Keegan.)

A. I saw her swing at the time she gave the one blast.

Q. Was that in answer to the different changes we are inquiring about?

A. How would I know; I left the bridge. [139]

Q. In the five minutes that you were on the bridge from the time you first saw her and up to the time that you went to the lavatory—in the interval between the time you first saw her and the time at which you left the bridge, you say was about five minutes? A. In that neighborhood; yes.

Q. Had the “Beaver” altered her course from what she was pursuing when you first saw her?

A. She had not to my knowledge.

Q. You saw her, did you not, you kept your eye on her?

A. I saw her plainly for somewhere in the neighborhood of five minutes; I would not say how long. At that time I saw her starboard side, and she was continuing on her course, as far as I know.

Q. At that time she was on such a course that would take her a mile to your starboard?

A. Yes, sir.

Q. When you came out of the lavatory you said she had changed her course somewhat, so as to bear in closer to you?

A. Yes, sir; she must have; she was closer than I expected she would be.

Q. At that time you said that you thought she would pass you one-half a mile to your starboard. Why do you change your testimony?

(Deposition of Austin Keegan.)

A. I say I saw her after coming out of the lavatory two points, in that neighborhood; she was well on our starboard bow, and I saw her whole starboard bow. I have not at any time said she would pass me one-half a mile inside of me. I do not know really how far. I saw this vessel two points on my starboard bow. I saw the whole starboard side of that ship. Had she proceeded on that course as she was doing at the time I came out of the lavatory there would have [140] been no collision.

Q. How do you reconcile your statement that she would not have passed half a mile to your starboard with the statement of your chief officer who has testified she would have passed three-quarters of a mile?

A. I do not know about any testimony he gave.

Mr. DENMAN.—Objected to on the ground it calls for the conclusion of the witness.

A. (Contg.) She must have hauled out; she must have changed her course from the first time I saw her.

Q. Do you mean the “Beaver”? A. Yes, sir.

Mr. CAMPBELL.—Q. And borne in towards you?

A. Yes, sir; she certainly must have, or she could not have gone so close.

Q. How far would you say now after you had made this drawing the “Beaver” would have passed you?

A. When I first saw her she should have passed us about a mile; when I saw her after coming out of the lavatory she should have passed us a good safe distance.

Q. What is that? A. A good safe distance.

(Deposition of Austin Keegan.)

Q. What is that?

A. Any distance but well clear of each other.

Q. What is your judgment of the distance she would have passed your starboard when you came out of the toilet? A. I cannot say.

Q. What is your judgment?

A. A good safe distance.

Q. What do you call a good safe distance?

A. Where there is room for two bad steering vessels to pass each other.

Q. Was your vessel of that type?

A. My vessel steers well.

Q. What was the distance in feet that you would say she would have passed you?

A. I cannot answer that. [141]

Q. You cannot or you don't want to?

A. I refuse to answer that.

Mr. DENMAN.—I don't think there is any need for that suggestion. Go on and answer it.

A. No, sir, I am not going to answer such questions as that.

Q. Why not? A. What is the sense of it?

Q. He has a right to have his question answered.

A. That is all right. If I put it in half miles or feet I would have to say something—I would have to go down and figure it.

Q. The reason you do not want to answer it is you have not figured it?

A. I have not the material at hand to.

Mr. CAMPBELL.—Q. Until you laid it down on the chart here and was checked up by your own

(Deposition of Austin Keegan.)

counsel, you still had in mind she would have passed you half a mile? A. I never said that.

Q. Up to the time you took hold of the chart you still had in mind she would pass you one-half a mile to your starboard?

A. I never said she would pass one-half a mile abeam of me.

Mr. DENMAN.—I think the witness has a right to go back and see.

The WITNESS.—I do not care about that. It has nothing to do with me. I am telling the truth.

Mr. DENMAN.—That is all going into the record.

Mr. CAMPBELL.—Mr. Reporter, will you turn back to that part of the witness' testimony and read it.

(Thereupon the Reporter reads the testimony.)

Mr. CAMPBELL.—Q. Why were you discharged by the Hammond Lumber Company, on account of this collision? A. No, sir. [142]

Q. Why did you state you were discharged?

A. I was in a sense, and in another sense I was not; I had a row with Mr. Hammond.

Q. Were you on the "Necanicum" after this collision? A. I was for some little time.

Q. Were you discharged on account of this collision?

A. No, sir; the collision was not referred to whatever. I had a row with Mr. Hammond, just the same as I might have a row with anybody.

Mr. CAMPBELL.—That is all.

(Deposition of Austin Keegan.)

Further Redirect Examination.

Mr. DENMAN.—Q. At Mr. Campbell's request there was read to you your testimony given to him in regard to the position of the two vessels as you saw them when you came out of the lavatory, and from that testimony it appears that you stated that you thought from the position of the vessel as you saw her when you first looked out after leaving the lavatory that she would pass you half a mile on your star-board side? A. I did make that statement.

Q. I will ask you whether or not that is correct.

A. When I came out of the lavatory if she continued on her course, she should have passed me roughly half a mile.

Q. How could she do that two points on your star-board bow?

Mr. CAMPBELL.—Objected to as being cross-examination of his own witness.

A. When I came out of the lavatory, that is just a rough guess; judging her appearance when I came out of the lavatory she was going full speed at the time; she might have passed in that neighborhood, it might be less, and it might be more; at any rate she had plenty of room to pass if she continued on [143] her course; that is my statement from beginning to end.

Q. And you say your impression as to half a mile cannot be true as an exact figure?

Mr. CAMPBELL.—Objected to as not proper re-direct examination; it is cross-examination and a leading question.

(Deposition of Austin Keegan.)

A. As to what exact figure?

Mr. DENMAN.—Q. As to half a mile being the distance—

A. (Intg.) By direct bearing from my vessel?

Q. Bearing two points as you looked at her and saw her two points on your starboard bow.

A. I said two points or more on my starboard bow; somewhere in that neighborhood. When I came out of the lavatory the vessel should have passed well clear of us had she continued on her course. That is the shortest way to put it. When I first saw the vessel she was five or six miles off, somewhere in that neighborhood. Then, bringing it up again when I first saw her, it confused me. When I first saw the vessel she was five or six miles off, which I stated here at different times, and then you again bring it up when I first saw her. All you want is the truth, isn't it?

Q. Yes. When you first saw her, in your judgment she was going to pass you a mile off?

A. Yes, sir. She should have passed us a mile off. She was bearing a point on our bow, and should have passed one mile off. When I next saw the vessel if she had gone on about her business she would have passed us well clear. I would not say how many feet. I might go back over the course and take my tape measure and measure it off.

Q. Could you tell the exact course the other vessel was on? A. I was not on the other vessel. [144]

Q. Could you tell the exact course of the other vessel?

(Deposition of Austin Keegan.)

A. When you see the other vessel's whole starboard side you know she is going clear of you.

Q. Could you tell the course within 10, 15 or 20 degrees?

A. You could tell she is coming down the coast.

Q. Can you tell anything more looking at a vessel across the bow?

A. Well, vessels coming down the coast, some swing two points. I have been mate in one of those that grind away steam. The "Beaver" is not that class of vessel.

Mr. DENMAN.—That is all.

Further Recross-examination.

Mr. CAMPBELL.—Q. She may have been as much as three points on your starboard bow when you first came out of the lavatory?

A. She might have been; I did not take a bearing. Owing to the fact that I saw her whole starboard side and she appeared to be going well clear. I thought she was safe and if she continued to go on her course she was safe.

Q. And you would not say she was not four points?

A. It was in the neighborhood of two points.

Q. She might have been four points?

A. You might ask me, it might have been 20 points. I am saying roughly in that neighborhood. I saw her whole starboard side and she was far enough away from us to go clear of us; a long ways off, that is what I consider for passing a boat, and ample room to pass inside of us.

Mr. DENMAN.—That is all.

(Deposition of Austin Keegan.)

Mr. CAMPBELL.—That is all until I have a chance to see that bridge log.

The WITNESS.—The bridge log is the same as you have [145] there, as far as I know.

Mr. CAMPBELL.—I want the record to show I have not consented to the conclusion of the testimony of the captain until the bridge log is produced.

Mr. DENMAN.—The record speaks for itself. I will endeavor to produce the bridge log if I can find it. I have never seen it myself. I have a copy of it, and the copy is the same as the log book.

(An adjournment is here taken until to-morrow, Tuesday, May 12th, 1914, at 10 o'clock A. M.) [146]

Tuesday, May 12th, 1914.

Mr. DENMAN.—I have inquired at the office of the Hammond Lumber Company for the bridge log and they say they have not had it there. I have not seen it myself, and I presume it must be on the ship, which will be in port in the course of a few days, but I suggest that counsel examine the witness on this log so that in the event they are unable to find the other log there will be no loss of time, or if it appears that the other log is identical with this—

Mr. CAMPBELL.—(Intg.) I do not care to examine the witness respecting this log. It is the bridge log that I am interested in seeing.

Mr. DENMAN.—The point I am making is this: in the event that the bridge log proves to be identical with this the necessity for an examination of the captain on it will be unnecessary. There will be no necessity for calling him.

(Deposition of Austin Keegan.)

Q. Did you have anything to do with the bridge log, Captain?

A. No, sir, I very seldom made an entry in it.

Q. Did you make any entry in this bridge log other than the one correcting the depth of water which you got off Point Reyes?

A. I made no entry myself. I took the sounding and I told the second mate 37 fathoms, but he must have misunderstood me and put down 27 in place of 37. I noticed that afterwards.

Q. Did you make any entry in that log concerning the collision?

A. No, sir, not myself. I very seldom make an entry, only when I take soundings, I sometimes put down the soundings; sometimes through the night I once in a while mark them down myself, but not as a rule.

Q. Captain, yesterday in response to an inquiry from Mr. [147] Campbell you stated that you had left the employ of the Hammond Lumber Company?

A. Yes, sir.

Q. When was that about?

A. Somewhere in the latter part of April.

Q. Of this year?

A. Yes, sir. I have a little book; I guess it is in my other clothes; the date would be in it.

Q. It is within the last month, or month and a half?

A. A little more, I think.

Q. Amounting to as much as two months?

A. No, not two months yet. I think it was somewhere in the latter part of April, or March rather.

(Deposition of Austin Keegan.)

Q. Also yesterday in answer to an inquiry of Mr. Campbell you stated that your vessel when reversing after going ahead and before she had lost her headway would turn to your starboard as she went through the water? A. Yes, sir.

Q. But you did not state how much she would turn before she lost her headway, and I would like to know how much in your opinion she would turn?

A. Oh, she would swing probably about three points or somewhere around there, a rough guess, to starboard.

Q. That would be a course curving towards the starboard away from the port away across?

A. Yes, sir.

Q. She might otherwise have? A. Yes, sir.

Mr. DENMAN.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. Then I understand your statement to be that at the time your vessel actually began to move astern, if she did so, she had swung about three points to starboard of what her course had been at the time you started to reverse?

A. Somewhere in that neighborhood she would.
[148]

Q. And would she continue to swing to starboard while she was gaining sternway? A. Yes, sir.

Q. How many points had she swung to starboard at the time of the collision?

A. Perhaps, maybe about four points, somewhere in that neighborhood; three or four points; I would not say exactly.

(Deposition of Austin Keegan.)

Q. You already have three points before she gains sternway at all, and you testified yesterday that you had sternway for how long, three-quarters of a minute? A. Somewhere in that neighborhood.

Q. Would she not turn quicker to starboard when she was under sternway than when she was simply backing and before she gained sternway?

A. When you back them with a right-hand screw the stern swings to port and the bow comes to starboard.

Q. The more sternway she gets the faster she will swing? A. Yes, sir; she will faster, I presume.

Q. Then, in your judgment, if she was backing, if she had sternway for three-quarters of a minute would she not swing more than a point further to starboard in three-quarters of a minute?

A. In the first place—let me think a bit. She was backing for two minutes or more, and in that length of time why I would figure that she would swing probably about three or four points in about two minutes backing; about that I would say.

Q. Would she go as high as five points?

A. Well, I could not say exactly, you know; I could not say exactly.

Q. Did you look at the compass at all to see what she responds?

A. I looked at the compass when the ship struck.
[149]

Q. What was she heading then?

A. North northwest.

Q. North northwest? A. Yes, sir.

(Deposition of Austin Keegan.)

Mr. CAMPBELL.—I would like to have the present log marked for identification, and then I want to see the bridge log when the steamer arrives.

The WITNESS.—She left here yesterday, I think.

Mr. CAMPBELL.—Q. You are not on board any vessel at the present time? A. No, sir.

Q. You do not know when you are going to sea again? A. No, sir.

Q. How long have you been ashore now since you left the Hammond Lumber Company?

A. I left the Hammond Lumber Company, and since that I was mate on the "Melville Dollar," but I left her on account of this thing.

Q. When the "Necanicum" reaches port if we consider it necessary to make any further examination, after the bridge log is produced, we can secure your attendance for the short period of time required, can't we?

A. If you wish. The only thing is I do not want to stay around for nothing.

Q. We do not ask you to do that. If you do go to sea you will be in the coastwise trade, so that you will be in and out of the port of San Francisco very likely? A. Very likely.

Q. That is the business you have been in in the last few years?

A. Yes, sir, but I was thinking of looking up a sailing vessel, and if I do I will probably go off shore.

Mr. DENMAN.—Q. You will let me know?

A. Yes, sir.

Q. Is Mr. Beckwith still on the "Necanicum"?

(Deposition of Austin Keegan.)

A. No, sir, Mr. Beckwith is ashore; any time you want him here you can [150] have him.

Q. When did Mr. Beckwith come ashore?

A. I think he must have left the day before yesterday, or yesterday perhaps.

Mr. CAMPBELL.—Q. What is your address, Captain?

A. My address is 3235 Twenty-third Street.

Q. San Francisco?

A. San Francisco. I have a telephone there, too. The telephone number is Valencia 5231.

Mr. DENMAN.—Q. Is it your opinion, Captain, on this day that the vessel had swung as much as four points to starboard on the reversing propeller?

A. Well, I would not say, Mr. Denman; somewhere in that neighborhood; three or four points I would say, in that neighborhood.

Q. In your opinion would it reach as much as 5?

A. I do not think so. I would say that she would swing three or more points in two minutes.

Q. By that you do not mean 10 more?

A. No, sir.

Q. Between three and four?

A. Well, about between three and four points.

Mr. DENMAN.—That is all.

Mr. CAMPBELL.—That is all. [151]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, United States Commissioner for the Northern District of California, do hereby certify

that the reason stated for taking the foregoing deposition is that the testimony of the witnesses Walter N. Beckwith, John T. Gannan, George A. Olsen and Austin Keegan is material and necessary in the cause in the caption of the said depositions named, and that they are bound on voyages to sea and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Friday, April 17th, Tuesday, April 28th, Monday, May 11th, Tuesday, May 12th, 1914, I was attended by Ira A. Campbell, Esq., proctor for the libelant, and by William Denman, Esq., proctor for the respondent, and by the witnesses who were of sound mind and lawful age, and that the witnesses were by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth; that said depositions were, pursuant to the stipulation of the proctors for the respective parties hereto taken in shorthand by Herbert Bennett, and afterwards reduced to typewriting; that the reading over and signing of said depositions of the witnesses was by the aforesaid stipulation expressly waived.

Accompanying the said depositions and forming a part thereof are "Libelant's Exhibit 1," "Libelant's Exhibit 2," "Libelant's Exhibit 3," "Libelant's Exhibit 4," for identification, and "Claimant's Exhibit 1," introduced in connection [152] therewith and referred to and specified therein.

I further certify that I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the United

**Notice of Taking Deposition De Bene Esse (of
Theodore J. Hewitt, 15,513).**

To Claimant and Respondent Above Named, and to
Its Proctors:

You and each of you will please hereby take notice that Theodore J. Hewitt, a witness whose testimony is necessary in this cause, and who resides at a greater distance from the place of trial than one hundred miles, will be examined *de bene esse*, on the part of libelant in this cause, before John P. Hannon, Esq., a notary public in and for the State of Oregon, at his office in the Wells Fargo Building, situate in the City of Portland, State of Oregon, on Tuesday, the 13th day of October, 1914, at the hour of ten o'clock in the forenoon of said day, at which time and place you are hereby notified to be present and propound interrogatories if you shall think fit.

Dated: San Francisco, Cal., October 8, 1914.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Libelant.

Service of the within notice and receipt of a copy is hereby admitted this 8th day of October, 1914,
11:30 A. M.

W. S. BURNETT,

WILLIAM DENMAN,

DENMAN and ARNOLD,

Proctors for Respondent. [154]

*In the United States District Court, for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libellant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

**Order for Taking of Deposition De Bene Esse (of
Theodore J. Hewitt, 15,513).**

IT IS HEREBY ORDERED that the deposition of Theodore J. Hewitt, a witness on behalf of libellant in the above-entitled cause, may be taken before John P. Hannon, Esq., a notary public in and for the State of Oregon, at his office in the Wells Fargo Building, in the City of Portland, State of Oregon, at the hour of ten o'clock A. M. on Tuesday, the 13th day of October, 1914, upon a notice *de bene esse* being given to the proctors of claimant and respondent, Messrs. Denman & Arnold, of San Francisco, California, such notice to be served not later than the hour of twelve o'clock noon of this 8th day of October, 1914.

Dated: San Francisco, California, October 8, 1914.

M. T. DOOLING,

District Judge.

Service of the within order and receipt of a copy is hereby admitted this 8th day of October, 1914, 11:30 A. M.

W. S. BURNETT,
WILLIAM DENMAN,
DENMAN and ARNOLD,
Proctors for Leggett S. S. Co. [155]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corporation,
Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,
Respondent.

**Notice of Taking Deposition De Bene Esse (of
Theodore J. Hewitt, 15,675).**

To Libelant Above Named, and to Its Proctors:

You and each of you will please hereby take notice that Theodore J. Hewitt, a witness whose testimony is necessary in this cause, and who resides at a greater distance from the place of trial than one hundred miles, will be examined *de bene esse*, on the part of respondent in this cause, before John P. Hannon, Esq., a notary public in and for the State of Oregon, at his office in the Wells-Fargo building, situate in the City of Portland, State of Oregon, on Tuesday, the

13th day of October, 1914, at the hour of ten o'clock in the forenoon of said day, at which time and place you are hereby notified to be present, and propound interrogatories if you shall think fit.

Dated: San Francisco, Cal., October 8, 1914.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent.

Service of the within notice and receipt of a copy is hereby admitted this 8th day of October, 1914, 11:30 A. M.

WILLIAM DENMAN,

W. S. BURNETT,

DENMAN and ARNOLD,

Proctors for Libelant. [156]

*In the United States District Court, for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corporation,
tion,

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Respondent.

**Order for Taking of Deposition De Bene Esse (of
Theodore J. Hewitt, 15,675).**

IT IS HEREBY ORDERED that the deposition of Theodore J. Hewitt, a witness on behalf of respondent in the above-entitled cause, may be taken

before John P. Hannon, Esq., a notary public in and for the State of Oregon, at his office in the Wells-Fargo Building, in the City of Portland, State of Oregon, at the hour of ten o'clock A. M. on Tuesday, the 13th day of October, 1914, upon a notice *de bene esse* being given to the proctors of libelant, Messrs. Denman and Arnold, of San Francisco, California, such notice to be served not later than the hour of twelve o'clock noon of this 8th day of October, 1914.

Dated: San Francisco, California, October 8, 1914.

M. T. DOOLING,

District Judge.

Service of the within order and receipt of a copy is hereby admitted this 8th day of October, 1914, 11:30 A. M.

W. S. BURNETT,
WILLIAM DENMAN,
DENMAN and ARNOLD,
Proctors for Libelant. [157]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libelant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Respondent.

Deposition of Theodore J. Hewitt, for Respondent.

BE IT REMEMBERED that, pursuant to a notice of taking deposition *de bene esse* issued at San Francisco, California, on October 8, 1914, by proctors for respondent, and an order for taking deposition *de bene esse* made and issued at San Francisco, California, on October 8, 1914, by the Honorable M. T. Dooling, District Judge of the above-entitled court, both notice and order being hereto attached

(Deposition of Theodore J. Hewitt.)

and made a part hereof, on October 13, 1914, at the hour of ten o'clock A. M., at my office number 510 Wells-Fargo Building, Portland, Multnomah County, Oregon, before me, John P. Hannon, a notary public in and for the State of Oregon, duly commissioned, sworn and qualified, personally appeared THEODORE J. HEWITT, a witness produced on behalf of the respondent; Erskine Wood appearing on behalf of libelant, and W. A. Robbins on behalf of respondent.

Said witness being first duly sworn to testify to the truth, the whole truth and nothing but the truth, was then and there examined by counsel for the respective parties, and testified as follows: [158]

Direct Examination.

(By Mr. ROBBINS.)

Q. Your name is Theodore J. Hewitt, I believe?

A. Yes, sir.

Q. Where do you reside, Mr. Hewitt?

A. I live here in Portland.

Q. How long have you resided here?

A. Since 1907.

Q. What has been your business or occupation during that time? A. I am an attorney.

Q. How long have you been an attorney?

A. Well, I was admitted in the State of Nebraska in 1903.

Q. What class of practice do you do here in the City of Portland? A. A general practice.

Q. What is the fact as to whether or not you have any connection with the San Francisco and Portland

(Deposition of Theodore J. Hewitt.)

Steamship Company, the respondent in this case?

A. None whatever.

Q. Have you any connection, or have you ever had any connection with the so-called Harriman interests? A. No, sir.

Q. Do you recall where you were during the latter part of October, 1913—October 30th, for instance?

A. Yes, we were on the steamship "Beaver" going from Portland to San Francisco. We left Portland on the afternoon of the 28th, as I remember, of October.

Q. And after you put out to sea do you recall what, if anything, happened along about two in the afternoon of the 30th?

A. On the 30th we had a little collision with a steam schooner, or ship of some kind out there on the ocean.
[159]

Q. Do you recall whether or not the name of the vessel was the "Necanicum"?

A. "Necanicum"; yes, sir.

Q. State where you were and what you were doing prior to the collision.

A. Well, I was sitting at the very back end of the boat, the stern, on the top deck—or the poop deck, I guess they call it—something like that. I was smoking, sitting there watching the ship carpenter; he was repairing some seats.

Q. Now, what was the condition of the weather at that time?

A. Well, the weather had been very nice during the fore part of the day and up until just a little while

(Deposition of Theodore J. Hewitt.)

before two o'clock, when we ran into a fog bank,—it seemed kind of to roll up onto us, or we ran into it; rather dense, not very dense, but quite a heavy fog bank.

Q. Now, while you were watching the ship's carpenter at work what, if anything, happened in the way of signals?

A. Well, just before we went into the fog bank they began blowing the fog-whistles.

Q. Pardon me; you mean by "they" the "Beaver"?

A. I mean the "Beaver," our steamship. And the fog signals were blown continually, about every minute, as I understand; they were blown.

Q. The fog-signal you refer to was the automatic fog-signal?

A. Yes; regular fog-signal that always blows.

Q. And for how long a period prior to the collision did you hear the fog-signals blown?

A. Well, I don't remember, but it must have been half an hour or so, at least, as I recall it.

Q. And did you hear any other signals by the "Beaver"? [160]

A. Well, after a little while, half an hour or so—I forget just how long—there was one long blast.

Q. Was it the "Beaver's" whistle?

A. Yes; quite different from the regular fog-whistle; and the ship's carpenter raised up and looked out across the ship towards the port side, off that way, and I turned,—as I was sitting almost facing directly the starboard side, I turned to the

(Deposition of Theodore J. Hewitt.)

port side, leaned that way, to watch the ship go by, as I knew that was the whistle to pass to port, and I turned to see the ship as it went by.

Q. Well, I forgot to ask you where you were sitting with reference to the center of the boat.

A. Right at the center—right back over the propeller.

Q. At the stern?

A. At the stern; yes. And I kind of swung around to the left to watch the other boat go by; and it was only, I should think, possibly a couple of minutes or so—it might have been three or four, but a very short time afterwards, they gave three short, sharp blasts.

Q. That is, the “Beaver”?

A. The “Beaver” did; yes. And the ship began to stop and shake; the ship trembled all over, and I knew that something was wrong; and the carpenter dropped his tools—he had a brace and bit, I think he was boring holes with—dropped that, let it fall on the floor, and ran directly across the ship toward the port side, and I knew then that there must be something wrong, and I ran down along the port side until I came to the life boats as they hung there and looked out across the water, and there I saw this other boat sitting almost at right angles ahead, quite a little bit ahead. [161]

Q. The “Necanicum”? A. Yes, sir.

Q. Now, at that time, how far, in your opinion, was the “Necanicum” from the “Beaver”?

A. Well, the fog, of course, was deceptive, and distance on the water I was not used to; I could not say

(Deposition of Theodore J. Hewitt.)

definitely, but should judge it must have been a couple hundred yards out there.

Q. And then after you saw the "Necanicum," what if anything else happened?

A. Well, I stood there looking at them a few minutes and didn't think of a collision until they kept drifting closer and closer together, and as I stood there I said to myself, "They are going to strike, sure as the devil." I heard someone laugh, and I saw a young fellow and a girl; they didn't know that there was another boat there, and didn't know what I was talking about, and laughed to hear me make that remark. And I stood there, and then they came right on and crashed together.

Q. Can you describe the impact, whether violent or not?

A. Quite violent—a loud noise, loud, crashing noise, and our boat listed quite a great deal to the right, or the starboard side; and my little boy, about seven years old, had been over on the starboard side watching a man painting the life-boats.

Mr. WOOD.—You don't know anything about that?

A. Well, he told me; he came running back to me.

Mr. ROBBINS.—We don't want what someone else said.

A. Well, he came back there crying; it frightened him, and he came back to find me and I was not there.

[162]

Q. First, now, what, if anything happened after the boat struck?

(Deposition of Theodore J. Hewitt.)

A. Well, the crowd on our boat—all the people on our boat crowded to the forward end of the boat.

Q. Well, what I mean, did they back straight away, the “Necanicum”?

A. The “Necanicum” backed straight away from us, and kept backing right straight off; they went right straight back away from us to the shore, and finally our boat signalled—gave some whistles, I don’t remember what those signals were, but immediately the “Necanicum” answered.

Q. For what distance would you say the “Necanicum” was after backing away from the “Beaver”?

A. Well, that must have been, oh, several hundred yards, probably five or six hundred yards, at least, they backed right straight away from us; possibly further than that. I could not tell distance very well on the ocean, of course, in the fog.

Q. Now, what is the fact as to whether or not the “Beaver’s” course was changed up to the time of giving the one long blast of the whistles?

A. As far as I know, there was no change in it at all. We were drifting along there smoothly, and nothing out of the way at all—seemed to be going right straight along. I sat at the very back of the boat over the propeller there, and I noticed no change whatever up until the three short blasts; that was the first change I noticed. That followed immediately within two or three minutes after the one long blast. The “Necanicum” blew no whistles at all, neither the fog-whistles nor response to the long blast to pass our boat.

(Deposition of Theodore J. Hewitt.)

Q. Well, did the "Beaver" change her course after she gave the long blast at any time?

A. Oh, she did; I know she did after the three short blasts; [163] but whether she did before that I was not noticing; but I know that they veered strongly to the right.

Q. That is to starboard?

A. To starboard; yes.

Q. That was just prior to the collision?

A. Yes, just prior to the collision, before I started to go down along the side.

Q. Did you have any trouble in noticing the difference between the long whistle and the automatic whistles of the fog-signal?

A. Oh, that was quite noticeable, the difference in those; it was one long blast then.

Mr. WOOD.—I understand you say they were given on different instruments, that is why the whistles were quite different in sound?

A. Well, I don't know about that. I know it was a long whistle, and the carpenter raised up and looked over toward the port side, and then when he did that I swung in my seat, kind of changed my position and turned that way, to the port side; and the life-boats were in the way, and I thought the boat must be out beyond the life-boats and I couldn't see it, you know.

Q. Kindly describe as near as you can the fog before and at the time of the collision, whether it was dense, coming in clouds, or how.

A. Well, we seemed to run into the fog; it was a fog bank that either came rolling up to us or that

(Deposition of Theodore J. Hewitt.)

we ran into. Yes, it was fairly dense, but not one of those blinding fogs. I could see all parts of our vessel, and I could see the other boat there quite plainly but I couldn't distinguish anything on it; it looked like a large, dark hull sitting out there, you know.

Q. Where did the "Necanicum" strike the "Beaver"?

A. About ten feet back of the stem of the boat, the front end [164] on the port side; made a big dent in it from the water-line clear to the top—broke the railing off at the top.

Q. Do you know of anything else in connection with this matter that I have not asked you about,—that is, the main collision?

A. No; nothing further that I know of.

Cross-examined by Mr. WOOD.

Q. Mr. Hewitt, when you were sitting on the stern there before you entered the fog bank, you were just watching the carpenter work? A. Yes, sir.

Q. And when you entered the fog bank, and when the whistles or fog-signals began to be given by the "Beaver," did you notice any change in her speed?

A. No, I can't say that I did.

Q. As far as you know then, her speed was not slackened when she entered the fog bank?

A. Not that I could tell; no.

Q. Do you know what her speed had been before that time? A. No, I don't know that either.

Q. But before that time the weather had been clear and nice?

(Deposition of Theodore J. Hewitt.)

A. Yes, as I remember it had been very pleasant.

Q. Now, where you were sitting—you were on the highest deck? A. Yes, the very highest.

Q. Where the life-boats are? A. Yes.

Q. Right over the propeller; then you would be directly amidships of the boat? A. Yes.

Q. Over the keel? [165] A. Yes.

Q. Now, when you heard the first long blast of the "Beaver"—I don't mean the fog signals; I mean the passing whistle—you then just turned in your seat and looked on the port side, expecting to see this other boat? A. Yes.

Q. And at that time did you see her or not?

A. No; the life-boats on the port side shut off my view of any distance away.

Q. Are the life-boats in a continuous string along the port side without any gaps between them?

A. As I remember, there were two or three on the outer side, and one or two on the inner, and a passage way between them, so that it shut off my view of the sea on the port side, although I could see down the vessel.

Q. Shut off your view of the sea on the port side entirely? A. Yes, sir.

Q. Was your view forward shut off?

A. Forward along the ship? I could see parts of the ship forward.

Q. You couldn't see the ocean forward.

A. No, I didn't notice the ocean.

Q. At the time then of the first signal you didn't know yourself whether the "Necanicum" was on the

(Deposition of Theodore J. Hewitt.)

port bow of the "Beaver" or dead ahead, or on the starboard bow, did you?

A. No, except that I recognized the whistle.

Q. Simply the fact they gave one whistle led you to think it was on the port side?

A. Not altogether. The fact of the carpenter having raised up and looked across that way called my attention to it, to look over across that way. [166]

Q. Then not seeing any boat there, as I understand, you got up and walked forward on the port side? A. That was after the—

Q. After the three whistles?

A. After the three whistles; after the carpenter dropped his tools and ran.

Q. He ran?

A. He dropped his tools on the floor and ran over toward the port side, diagonally across.

Q. And you followed him?

A. I walked down on the outside, on the port side.

Q. You mean on the outside of the life boats?

A. Outside of the life-boats; I walked down along the port side until I got to the life-boats, and I could see the boat sitting out there in the water.

Q. That is, when you reached the first life-boat?

A. Yes, then I could see the "Necanicum."

Q. How long was that after the three whistles?

A. Oh, that was immediately; quick as he dropped his tools and ran. I knew something was wrong; I knew from the way the boat was trembling and shaking there was something wrong.

Q. Was the "Beaver" reversing at that time?

(Deposition of Theodore J. Hewitt.)

A. I suppose so. Of course I don't know what that whistle was, but they were certainly making a big commotion.

Q. You judge that from the trembling of the ship?

A. Because of the propeller right below me, and the trembling of the ship and her veering to the right at that time.

Q. How long were the three whistles after the first passing blast?

A. That, as I say, must have been anywhere from two to four minutes afterward; shortly afterward.

[167]

Q. When you ran forward immediately after the three whistles and stood by the stern against the life-boat, and looked off and saw the "Necanicum," is that when you mean she was about two hundred yards away?

A. As I remember it then; of course, the distance might have been very deceptive to me.

Q. You said she appeared to be at right angles to you? A. Almost; yes.

Q. Was she abeam of you or was she off the port bow?

A. She was off the port bow, quite a little ways forward.

Q. But the two boats were lying approximately at right angles?

A. As near I could judge them they were headed a little towards us, and our bow seemed to be turning to the right continually, and they were heading at right angles to our boat possibly, towards us.

(Deposition of Theodore J. Hewitt.)

Q. A little bit more than right angle?

A. Yes, kind of towards us.

Mr. WOOD.—It might be a good idea to make a rough diagram there.

(Witness draws a diagram.)

Q. Now, how far do you estimate it from your position upon the “Beaver” to the bow of the “Necanicum”?

A. Well, as I say, it seems to me it was about two hundred yards.

Q. I will mark with a dotted line the distance that you estimate to be two hundred yards.

A. Of course, as I say, it was the first time I was ever on the ocean, and being in a fog, I could easily have been mistaken as to the distance; it could have been more or less, but that is what it seemed to me.

Mr. WOOD.—I offer the diagram as Libelant’s Exhibit 1. [167½]

(Said diagram was marked Libelant’s Exhibit 1, and is attached hereto and made a part of this deposition.)

Q. Judging from this diagram then, I would suppose that the “Beaver” swung off after the three whistles quite rapidly, quite sharply, swung off to starboard, to her own starboard; is that correct?

A. Yes, I think she was practically stopped by the time of the collision; she swung to the starboard and started to reverse, and at the time the “Necanicum” struck I think she was practically stopped.

Q. But what I mean is this: When you first looked forward from your seat at the stern, you did not

(Deposition of Theodore J. Hewitt.)

see any boat on the port side at all, and you didn't notice any change in the "Beaver's" course after her first whistle? The first change you noticed in her course was after three whistles, and then you ran forward and saw the boats in that position, which would lead me to think that the "Beaver" must have swung very rapidly after the three whistles to her own starboard, and I wanted you to say if I am right.

A. That is the impression that I got of it, that she swung to the starboard, and so in reversing had tried to stop and let the other boat pass on ahead.

Q. Would you guess that she swung as much as at right angle to her former course?

A. No, she didn't swing that far.

Q. How much would you think?

A. Well, I couldn't say how much.

Q. When you saw the "Necanicum" two hundred yards away through the fog, is that the time you refer to when you said you could [168] not distinguish objects on her very well, you could just see a dark hull out there? A. Yes, sir.

Q. The fog then was quite dense?

A. A fairly dense fog; yes.

Q. Were any other passengers about on the deck that you know of?

A. No, not up where I was there was not, except these two that laughed when I made that remark; I noticed them there,—and my little boy.

Q. He was on the lower deck from you?

A. He was on the same deck, on the starboard side until he got scared, I don't know just where, at the time.

(Deposition of Theodore J. Hewitt.)

Q. When the "Necanicum" backed off after the collision five or six hundred yards, as you estimate, what happened then? Did the boats each go on their way, and you lost sight of the other, or what?

A. Before we started on our boat signalled them and they signalled back. I don't remember what those whistles were or how many, except what I was told by the purser afterwards, and immediately after that we proceeded on our way.

Q. Well, when she was off five or six hundred yards, is that when you lost sight of her on account of the fog?

A. Well, I don't remember. After we had started on—

Q. (Interrupting.) You paid no more attention.

A. Paid no more attention, but we were all talking and trying to get to the purser and to the captain to find out what had happened, and then as many as could rushed to the wireless to find out what they were sending out there if we could.

Q. How long was it from the three whistles to the collision?

A. Well, I can't say exactly how long, but it could have been [169] but a very few minutes, I know, as I first saw her out there I didn't think anything about their going to strike, but they kept drifting closer and closer together.

Q. And your boat kept drifting?

A. Our boat had practically come to a standstill, and theirs came right on.

Q. How could you tell that yours was standing still?

(Deposition of Theodore J. Hewitt.)

A. I could tell by the feeling of it, and by the way we were moving in the water that we were practically come to a standstill.

Q. Were you still reversing? A. Yes.

Q. That is, the engines were still going?

A. Yes, the engines were still going.

Q. I asked you before what her speed was—I mean the “Beaver’s”—before she entered the fog bank, and you said you didn’t know. You probably thought I wanted you to answer in knots; I didn’t want that—I wanted an idea whether it was fast or slow.

A. Oh, fast or slow. Well, I couldn’t notice any change in the boat except that we were going along at the regular rate.

Q. Ordinary speed and fair weather?

A. Ordinary speed and fair weather, when we first ran into the fog bank. We heard no whistles at all, other than our own. They didn’t even answer the “Beaver’s” whistle.

Mr. ROBBINS.—The “Necanicum” didn’t?

A. They didn’t answer them.

Q. You mean you didn’t hear them?

A. Yes; I didn’t hear them.

Mr. ROBBINS.—You could have heard them if they had been blowing?

A. Well, I heard their answer after the collision; I heard [170] that very plainly.

Q. That was when they were closer together?

A. They must have been five or six hundred yards away at that time.

(Deposition of Theodore J. Hewitt.)

Redirect Examination.

(By Mr. ROBBINS.)

Q. Now, this fog bank you are talking about, where did you first run into this with reference to the collision,—that is, how long before?

A. Well, as I remember not over twenty minutes, possibly half an hour; and it was not very long before, we hadn't been in it very long, as I recall. Not thinking about it I might not be very accurate in my remembrance of it.

Q. Did that fog close clear down; or was it a floating cloud?

A. Well, I couldn't say; it was gone a short time afterwards; an hour or so afterwards we were out of it again.

Q. Well, in any event it didn't prevent your seeing the "Necanicum" two hundred yards away? I realize it is hard to describe a fog.

A. Oh, I could see the boat. As I came down along the side of our boat and looked out there I could see it.

Q. I believe you testified that the "Beaver" had practically stopped at the time they struck. How long before they struck had she stopped?

A. Well, I couldn't say as to that, because I was looking at the other boat pretty closely.

Q. What could you estimate—one minute, or three, or five?

A. It couldn't have been over a minute she was stopped, because they came together quite rapidly.

(Deposition of Theodore J. Hewitt.)

Recross-examination by Mr. WOOD.

Q. Well, I understood when you said she was practically stopped that she still had a little motion on her, and you answered Mr. Robbins just now that she had stopped perhaps a minute before the collision. You don't mean she was absolutely dead in the water?

A. No, I don't mean that—that she was as near as I could tell. We were practically stopped. She might have been drifting with her own momentum.

Q. She might still have had a little headway on?

A. Or might have been reversing, backing, as far as I know. I was not noticing that part of it at that particular moment.

Mr. ROBBINS.—You knew the engines had been stopped—had been reversed?

A. I am sure the engines had been reversed.

Q. The engines were reversed, as you judged from the tremor of the boat?

A. Yes, that is all I know.

Q. At the same time the three whistles were blown.

A. At the time the three whistles were blown.

Q. And then is when she began to swing rapidly to her own starboard? A. Yes.

AND FURTHER DEPONENT SAITH NOT.

THEODORE J. HEWITT. [172]

State of Oregon,

County of Multnomah,—ss.

I, John P. Hannon, a notary public in and for the State of Oregon, duly commissioned and sworn, hereby certify that, pursuant to the notice and order

to take deposition *de bene esse* both issued at San Francisco, California, on October 8, 1914, by the Honorable M. T. Dooling, District Judge of the within entitled court, hereto attached, appeared, at the time and place mentioned in the caption hereof, Theodore J. Hewitt, a witness produced on behalf of the within named respondent, and after being by me first duly and publicly sworn to tell the truth, the whole truth and nothing but the truth, said witness was examined by proctor for respondent and cross-examined by proctor for libelant, and said examination, together with the answers of said witness thereto, was by me caused to be taken down in shorthand and afterwards transcribed into type-writing; and after being so transcribed the testimony of said witness was read over and corrected by said witness, who thereupon in my presence subscribed the same.

I further certify that the exhibit attached hereto, being marked "Libelant's Exhibit 1" and initialed by me, is the identical paper which was offered during the examination of said witness, and is herewith returned as part of said deposition.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my notarial seal this 13 day of October, 1914.

[Seal]

JOHN P. HANNON,

Notary Public for Oregon. [173]

(Libelant's Exhibit 1 has been detached from the original deposition, and transmitted to U. S. C. C. A. in its original form.)

[Endorsed]: Opened and filed in open court, this 20th day of Oct. 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [174]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation, Owner of the American S. S. "BEAVER,"

Libellant,

vs.

The Steam Schooner "NECANICUM," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corporation,

Claimant.

Notice of Taking Deposition De Bene Esse (of A. F. Pillsbury, 15,513).

To Claimant and Respondent Above Named, and to Messrs Denman & Arnold and W. S. Burnett, Esq., Its Proctors:

You and each of you will please hereby take notice that A. F. Pillsbury, a witness whose testimony is necessary in this cause, and who is about to go out of the district in which the said cause is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial,

and who cannot be present in court at said trial on the 20th day of October, 1914, will be examined *de bene esse*, on the part of the libelant in this cause, before Francis Krull, Esq., a United States Commissioner in and for the Northern District of California, at the office of Messrs. McCutchen, Olney & Willard, situated in the City and County of San Francisco, State of California, on Monday the 19th day of October, 1914, at the hour of four o'clock P. M. of said day, at which time and place you are hereby notified to be present and propound interrogatories, if you shall think fit.

Dated, San Francisco, California, October 19, 1914,
12:20 P. M.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY, & WILLARD,

Proctors for Libelant. [175]

Service of the within notice and receipt of a copy is hereby admitted this 19th day of October, 1914,
12:20.

W. S. BURNETT,

WILLIAM DENMAN,

DENMAN and ARNOLD,

Proctors for Claimant and Respondent. [176]

*In the United States District Court, for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Libellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Respondent.

**Notice of Taking Deposition De Bene Esse (of
A. F. Pillsbury—15,675.**

To Libellant Above Named, and to Messrs. Denman
& Arnold and W. S. Burnett, Esq., Its Proctors:

You and each of you will please hereby take notice that A. F. Pillsbury, a witness whose testimony is necessary in this cause, and who is about to go out of the district in which the said cause is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, and who cannot be present in court at said trial on the 20th day of October, 1914, will be examined *de bene esse*, on the part of the respondent in this cause, before Francis Krull, Esq., a United States Commissioner in and for the Northern District of California, at the office of Messrs. McCutchen, Olney & Willard, situated in the City and County of San Francisco, State of California, on Monday, the 19th day of October, 1914, at the hour of four o'clock P. M., of said day, at which time and place you are

hereby notified to be present and propound interrogatories, if you shall think fit.

Dated: San Francisco, California, October 19, 1914, 12:20 P. M.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent. [177]

Service of the within notice and receipt of a copy is hereby admitted this 19th day of October, 1914, 12:30.

W. S. BURNETT,

WILLIAM DENMAN,

DENMAN and ARNOLD,

Proctors for Libelant. [178]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

Libelant,

vs.

The Steam Schooner "NECANICUM," Her Tackle,
Apparel, etc.,

Respondent.

No. 15,675.

LEGGETT STEAMSHIP COMPANY (a Corporation).

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

Claimant.

Deposition of Alfred F. Pillsbury, for Libelant.

BE IT REMEMBERED that on Monday, October 19, 1914, pursuant to notice and order of Court filed in the above-entitled cause, at the office of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Alfred F. Pillsbury, a witness produced on behalf of libelant.

Ira Campbell, Esq., appeared as proctor on behalf of the libelant, and William Denman, Esq., appeared as proctor on behalf of the claimant, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as in hereinafter set forth.

(It is hereby stipulated that the deposition, when written out, may be read in evidence by either party on the trial of [179] the cause; that all questions

(Deposition of Alfred F. Pillsbury.)

as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the deposition of Alfred F. Pillsbury may be taken in shorthand by E. W. Lehner. It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.) [180]

ALFRED F. PILLSBURY, called for the libellant, sworn.

Mr. CAMPBELL.—Q. Your name is Alfred F. Pillsbury? A. Yes.

Q. What is your business?

A. Marine Surveyor.

Q. Are you a Master Mariner? A. Yes.

Q. How long have you held papers as a master?

A. About 25 years.

Q. In what trades did you ever command ships as master?

A. Atlantic trade, European trade, South American trade, China trade, Panama trade and Pacific Coast trade.

Q. What type of ship were you master of in the China trade? A. Pacific Mail steamers.

Q. From the port of San Francisco? A. Yes.

Q. What other types of vessels have you commanded?

A. I commanded the steamer "Minneola," which

(Deposition of Alfred F. Pillsbury.)

was a tramp freighter collier and I commanded the steamer "Progresso," which was a tramp freighter blown up in this harbor in 1902; that was after I had left her. I have commanded sailing vessels, schooners, brigs and barks.

Q. How long have you been a surveyor?

A. Between 11 and 12 years.

Q. Are you attached to any board or society at the present time as a surveyor?

A. Yes; I am Pacific Coast representative of the Bureau Veritas, a classification society.

Q. That is the French classification society which corresponds to Lloyd's Register of Shipping?

A. Yes.

Q. Did you make a survey of the steamer "Beaver" following her collision with the steam schooner "Necanicum"? A. I did.

Q. On what date did you see the "Beaver"?

A. By looking at my notes I can tell you. [181]

Q. When were the notes made to which you are referring?

A. Made at the time. November 1, I made the first inspection of the "Beaver."

Q. Where was she at that time?

A. She was at the company's Pier 40, I think,—on the north side of Pier 40.

Q. When did you next inspect her?

A. The next inspection was November 2d at Hunter's Point drydock.

Q. At whose request did you make these surveys?

A. At the request of yourself.

(Deposition of Alfred F. Pillsbury.)

Q. Will you describe, Captain, the damage which you found to have been inflicted upon the "Beaver"?

A. I found the port side had been broken in from the shelter deck down to seven strakes below, and from there down the plating was buckled and crimped; that is on the port side; the balance of the way down the plating was disturbed, either by being buckled or crimped, all the way down to and including the keel plating. On the starboard side the plating was disturbed practically all the way down. The indent on the port side was in to within about 38 inches of the center line of the steamer.

Q. What depth of penetration would that be?

A. That would be a penetration of somewhere between 40 to 42 inches.

Q. On which deck was that?

A. That was on the shelter deck. It was about 8 inches more, or rather, I won't say more—it was nearer the center line on the main deck, to within 30 inches of the center line on the main deck; but the ship was a little narrower on the main deck than she was on the shelter deck.

Q. Is the shelter deck what you term the upper deck? A. The upper deck or weather deck. [182]

Q. What type of bow has the "Beaver"?

A. A very sharp bow, slightly flaring from the last 10 or 12 feet.

A. At the same point abaft the stem, which is the wider deck? A. The shelter deck.

Q. How does the main deck compare with the 'tween-decks? A. A little wider, but not much.

(Deposition of Alfred F. Pillsbury.)

Q. What was the condition of the main and shelter decks, particularly the main deck, at the point of contact? A. Particularly the main deck?

Q. Yes.

A. Well, it was set in and disturbed, the plating buckled up and everything in connection with it at that point broken or bent.

Q. What kind of a deck was the main deck?

A. The main deck was a steel deck.

Q. What was the shelter deck?

A. Wood-sheathed; I am not sure now without referring to the survey whether it was steel underneath or not.

Q. In what condition did you find the stem to be?

A. The stem was out of line; to my recollection it was curved over to port; taking it at the top in the position it should be, possibly it was a little over to starboard and then it made a curve over to port down pretty nearly to the lower part.

Q. How far down on the starboard side was there damage to the plates?

A. I don't remember exactly.

Q. How did the damaged plates on the starboard side look to the eye?

A. Well, they buckled outward, outboard.

Q. At what angle, Captain, in your judgment, did the two vessels come together?

A. At an angle of 5 or 6 points off the bow of the "Beaver." [183]

Q. I hand you an enlarged photograph and ask you if you can identify it.

(Deposition of Alfred F. Pillsbury.)

A. Yes; I made that photograph, or rather, I made the original, and this is an enlargement of the original.

Q. Can you state whether or not it correctly shows the damage to the "Beaver" as you saw it at the time you took the photographs?

Mr. DENMAN.—All the damage.

Mr. CAMPBELL.—The damage that is shown in the photograph—the damage to the "Beaver" at the time he took the original.

A. It shows a certain portion of it; the damage on the starboard side it does not show so much.

Mr. CAMPBELL.—I offer that in evidence.

Mr. DENMAN.—Let me cross-examine him on that, if I may.

Q. This shows the—this was taken at about the angle at which you think she struck the vessel?

A. No, I don't know that, Mr. Denman; I could not tell you whether they took it from 3 points on the bow.

Q. I mean looking at it now; is that about the angle at which you think the two vessels came together?

A. No, I don't think so.

Q. Have you any photographs taken which supplement this by giving the angle looking from stern forward?

A. Mr. Campbell has, I think, all that I took, here.

Q. I am asking you now whether you remember taking any photographs showing the angle from the stern forward.

Mr. CAMPBELL.—Is this a general cross-exam-

(Deposition of Alfred F. Pillsbury.)

ination or cross-examination upon this particular photograph?

Mr. DENMAN.—I want to find out if he has not a photograph showing that.

A. I cannot say. But I would like to state the weather conditions were very bad on that day, it was raining and it was very difficult to get good photographs; I took them the [184] best I could.

Q. Yes; but, Captain, if you wanted to give a fair view from aft forward you could have taken that as well as this view from forward aft, couldn't you?

A. I don't know that I could.

Q. Why not?

A. Because it was very gloomy and rainy weather.

Q. Would that make any difference as to the angle at which you photographed the cut in that vessel?

A. It might.

Q. Do you remember that it did?

A. No, I am not an expert on photographs.

Q. But I mean particularly, you wanted to take a view which would give the same angle forward as aft.

Mr. CAMPBELL.—If you are going to examine him generally I shall object to it until I finish my direct examination. If you want to examine him with reference to this photograph, go ahead.

Mr. DENMAN.—Very well.

(The photograph was marked "Libelant's Exhibit 1, Pillsbury.")

Mr. CAMPBELL.—I have here, Mr. Denman, the smaller photographs to which Captain Pillsbury

(Deposition of Alfred F. Pillsbury.)

refers as having been handed to me, if you wish to see them.

Mr. DENMAN.—Are you going to put them in evidence?

Mr. CAMPBELL.—No.

Q. At what angle, in your judgment, Captain, did the two vessels come together?

A. Well, as I have said, at an angle between 5 and 6 points, across the bow of the "Beaver."

Q. Did you ever examine the "Necanicum"?

A. Yes.

Q. When and under what circumstances?

A. The first time I made a rather superficial examination. That was on October 31st. The circumstances were these: Captain Curtis was away, and I was looking after his work. On the morning of the 31st while surveying a steamer on the south side of Pier 27, I think, the steamer "Indrawadi," I noticed the [185] "Necanicum" on the other side of the wharf and some damage there—so I went aboard and asked the captain if I might look at it. I told him the nature of my employment at the time, and while I did not want him to talk about it, I wanted to see it so I could report to the Board of Underwriters, and I just made a preliminary examination of the stem; he told me the tiller was also bent.

Q. Never mind about his conversation, just what you saw yourself.

A. I saw the stem and the damage around the stem.

(Deposition of Alfred F. Pillsbury.)

Q. What did you find to be the character of the damage that was suffered by the "Necanicum"?

A. I found the iron bark stem shattered all the way down, or practically all the way down to the scarphs somewhere about the 6 or 7 foot line; and the stem and the iron bolts that fastened the stem were all bent over to port. I later was called on by yourself and I inspected the "Necanicum" at the United Engineering Works afloat and also on Moore & Scott's railway. At the United Engineering Works I saw the rudder out; it was either on the deck of the "Necanicum" or on the dock. I saw the rudder-stock fractured on the after part; it looked like a fresh fracture. The tiller had been straightened; I did not see it when it was bent. I went below by permission of Mr. Jones and found the fuel oil-tank on the port side was shoved forward about $3\frac{1}{2}$ inches; that had torn out and broken the bolts that fasten the strap on the top of the tank to the beam, and had broken the chock on the forward end of the tank and pushed that chock through the wooden bulkhead. The starboard fuel oil tank had shifted very slightly, but had not started any of the chocks or the fastenings.

Q. What were the fuel oil tanks made of?

A. Steel.

Q. Of what size were they?

A. I think it was five-sixteenths.

Q. What were the dimensions of the tanks [186]

A. I wouldn't attempt to tell you. Do you mean in length?

(Deposition of Alfred F. Pillsbury.)

Q. Yes. A. I won't attempt to tell you.

Q. Will you give us an approximate idea of the capacity of the tanks?

A. I suppose it would be approximately 150 barrels.

Q. Now, Captain, from what you observed of the nature of the damage to the two vessels and from your experience as a shipmaster and surveyor I ask you what is your opinion as to the possibility of the headway of the "Beaver" having turned the "Necanicum's" head around to port, if the two vessels came together at the angle of impact that you fix.

A. I should think that is what did happen.

Q. How would the degree of the "Necanicum's" penetration into the side of the "Beaver" affect the amount of swinging of the "Necanicum's" head which would result from the collision?

A. Well, it might affect it in this way; of course the greater penetration perhaps the longer she would be held there by the "Beaver"—the greater the penetration the "Necanicum" made into the "Beaver's" side, the longer would the "Necanicum's" bow be held there.

Q. What effect would that have upon the swinging around of the "Necanicum"?

A. That would cause her to swing more until she was free, I suppose.

Q. Would the fact that the "Necanicum" was drawing 16 feet aft and 4 feet forward, affect the

(Deposition of Alfred F. Pillsbury.)

case or difficulty with which she would be so swung around?

A. Yes, she would be swung around easier; being down at the stern she would swing as though on a pivot.

Q. From the nature of the damage and your experience what is your opinion as to whether or not the "Necanicum" had any headway on at the time of the impact? [187]

A. In my opinion she had considerable headway.

Q. In your opinion could or could not the damage inflicted upon the "Beaver" have been done if at the time of the collision the "Necanicum" was dead in the water? A. It could not have been done.

Q. Could or could not it have been done if the "Necanicum" at the moment of collision had sternway? A. It would be impossible.

Q. What in your judgment was the relative speed of the two vessels at the time of impact?

A. It is hard to say. I think they both had good speed.

Q. What are your reasons, Captain, for expressing the opinion that the damage could not have been done to the "Beaver" if at the moment of impact the "Necanicum" had been either stopped or had sternway?

A. Answering your last question, if the "Necanicum" had sternway, I don't see how they could come together. If they had come together it would have been the lightest rub; if the "Necanicum" had no way, but was stopped in the water, the indent on the

(Deposition of Alfred F. Pillsbury.)

side of the "Beaver" would have been very light indeed.

Q. What would have been the nature of the blow?

A. The "Necanicum" perhaps would have slightly indented the "Beaver" between 1 or 2 or 3 frame spaces, but the frames would be so rigid that they would not have been disturbed. I say it might possibly slightly indent the plates between 1 or 2 or 3 frame spaces.

Q. Was there or was there not anything about the damage inflicted upon the "Beaver" which showed headway on the part of the "Necanicum" at the time of the collision?

A. The whole appearance of the "Beaver" would indicate in my opinion that the "Necanicum" had considerable headway. [188]

Q. Give us a little more in detail what you mean by the whole appearance.

A. Well, the nature of the injury to the "Beaver," the indent, and the fact that the plating on the other side was buckled out, and the bow, you might say, from that position forward disturbed and thrown out of alignment.

Q. Were you able to form any personal opinion as to what must have been the speed of the two vessels?

A. Not down to the exact mile; no.

Q. In your best judgment, what would you say their speed must have been?

A. Well, before answering that I would like to say that I have never heard the speed the "Beaver was

(Deposition of Alfred F. Pillsbury.)

making; I should think she must have been going something like 10 knots.

Q. What would you say must have been the speed of the "Necanicum"? A. 5 knots or over.

Q. That is at what time,—the moment of impact?

A. The moment of impact.

Q. If the "Beaver" and the "Necanicum" came together at the angle of impact which you fix and the "Necanicum" was drawing 16 feet aft and 4 feet forward, would it have required any great headway on the part of the "Beaver" to swing the "Beaver's" bow around to port so as to cause the vessels to be heading practically in the same direction after the collision?

A. Well, whether they were going 5 knots or 10 knots, it would still be swung around. I suppose of course the faster she was going the quicker she would be turned.

Q. Now assume that the two vessels approached each other at approximately the angle shown in "Libellant's Exhibit 1" attached to the deposition of Theodore J. Hewett, taken before John P. Hannon, Notary Public for Oregon, at Portland, Oregon, on October 13, 1914, of which exhibit I hand you a copy, and [189] further assuming that the "Beaver" was when in the position shown on the exhibit swinging under a port helm, or immediately thereafter swung under a port helm, could the vessels have come together and inflicted the damage done to the "Beaver" unless the "Necanicum" had headway at the time of the collision?

(Deposition of Alfred F. Pillsbury.)

Mr. DENMAN.—I object to the question on the ground that it contradicts the testimony of every officer and witness of the “Beaver” other than this one who is a mere passenger and nonmaritime person, and that it does not correctly describe the conditions as proved by the officers and crew of the “Beaver,” if their proof be true.

Mr. CAMPBELL.—Look at this. Will you repeat the question?

(Last question repeated by the Reporter.)

A. I may take this sketch as it is, may I?

Q. Yes.

A. This is the “Necanicum” and this is the “Beaver.” This is the testimony of the witness, that was 200 yards off.

Mr. CAMPBELL.—Yes.

Mr. DENMAN.—And at that angle.

A. No.

Mr. CAMPBELL.—Q. Referring again to the same exhibit and under the same conditions involved in the other question save this change, could the vessels have come together and inflicted the damage done to the “Beaver” if at the moment of impact the “Necanicum” had sternway? A. No.

Mr. CAMPBELL.—I offer in evidence this copy of “Libelant’s Exhibit 1” attached to the deposition of Mr. Hewett, to which I have referred Captain Pillsbury, simply that it may be compared with the original exhibit attached to the deposition which is on deposit with the Clerk of the court and not as yet

(Deposition of Alfred F. Pillsbury.)

offered in evidence in the case.

(The document is marked "Libelant's Exhibit 2, Pillsbury.") [190]

Cross-examination.

Mr. DENMAN.—Q. Captain, taking that last exhibit which has been handed to you and as to which you have testified, and extending the center lines of both, of the vessels, could the damage which you found in that vessel have been inflicted at the angle you said it was? A. Yes.

Q. Under what circumstances? I am presuming now that the "Beaver" is going at the rate of 10 knots and the "Necanicum" at the rate of 5 knots. Right off her bow, isn't she, in that?

A. It could have been inflicted if the "Necanicum" was going at a greater speed than the "Beaver."

Q. Now, as a matter of fact, the "Beaver" would have to be practically stopped, would she not?

A. Yes.

Q. Now, judging from the scars that you saw in the vessel and the testimony that you have given here, you believe that they came together at that angle, don't you, shown on that picture? A. Yes.

Q. Do you believe they came together from that position with those distances apart?

A. No, the distance must have been greater.

Q. And the "Necanicum" must have been turned somewhat to her starboard to have inflicted the injury, must she not?

A. No. I think that is just between 5 and 6 points.

(Deposition of Alfred F. Pillsbury.)

Q. But the supposition was that the "Beaver" was turning rapidly to starboard at the time the "Necanicum" was seen. Now, if you turn the "Beaver" to starboard rapidly as the "Necanicum" approaches, the "Necanicum" would have to turn to her starboard? A. Yes. That is right.

Q. Would you say that that correctly described the condition of those two vessels prior to the collision as you have given your testimony of what it was from the scars? [191]

A. Yes, excepting that the distance is not right.

Q. The distance is not right and the angle is not right?

A. I think the angle is pretty nearly right.

Q. If the "Beaver" was turning rapidly to starboard—

A. (Intg.) And the "Necanicum" was turning—

Q. (Intg.) To starboard? A. Yes.

Q. The "Necanicum" would have to be turning to starboard to bring about that condition, would it not? A. Yes.

Mr. CAMPBELL.—Q. To starboard or to port?

A. To starboard.

Mr. DENMAN.—To her starboard.

Q. Captain, as a matter of fact if the "Necanicum" were to turn to starboard she would not strike the "Beaver" at all, would she? A. Yes.

Q. Would she strike with sufficient power to do the damage you have described? A. Yes.

Q. Going at 8 knots? A. Yes.

Q. Then you think that the injury to these two

(Deposition of Alfred F. Pillsbury.)

vessels could be accomplished by their meeting at a joint speed of 8 knots, do you? A. Yes, easily.

Q. So that if the "Beaver" was going 8 knots the supposition would have to be that the "Necanicum" was standing still in order to inflict the injury, would it not?

A. You say the "Necanicum" would have to be standing still?

Q. If the "Beaver" was going 8 knots, if the "Necanicum" was standing still, the injury could be inflicted as far as force is concerned by the "Beaver" going 8 knots? A. No, not at all.

Q. What is the difference between running into a vessel at a sharp angle, which is lying off at a considerable angle to you, and that vessel running into you at a sharp angle?

Mr. CAMPBELL.—I submit the question is not intelligible. [192]

Mr. DENMAN.—Q. Is there any difference, Captain?

A. Will you put that in a different way, Mr. Denman, and illustrate the point a little?

Q. Will you kindly sketch the two vessels lying at the angle that you thought they were judging from the scars. Sketch them on a piece of paper. I wish you would sketch them.

A. Of course one is larger than the other. The "Beaver" is nearly twice the length of the other.

Q. I see that you have drawn the smaller boat, which I will mark the "Necanicum," as striking the

(Deposition of Alfred F. Pillsbury.)

side of the larger boat, which I will mark the "Beaver," at about right angles, the bend of the bow?

A. Yes, that is pretty nearly it, at the upper part.

Q. What scars did you find on the starboard side of the "Necanicum" that justified your making that estimate?

A. I found the paint disturbed, or rather, I found—

Q. (Intg.) On the starboard side of the vessel?

A. I found black paint—may I see that report? I don't know whether I could dig it out of my notes without taking a lot of time. "On making an examination of the 'Necanicum's' bows, black paint was found on the bulwarks on the starboard side about 3 feet aft the stem, which would indicate that the 'Necanicum' had penetrated the 'Beaver's' side to this extent."

Q. If instead of penetrating at the angle you have given the penetration had been in the angle marked "T," you still might have it for 3 feet on the starboard side, might you not? A. Yes.

Q. Did you measure the difference between the cut on the starboard side and the port side, on the sides of the "Necanicum"?

A. I don't think I did. [193]

Q. How far do your scars measure back on the starboard side of the "Necanicum"?

A. I don't remember.

Q. Then you did not estimate the angle at which

(Deposition of Alfred F. Pillsbury.)

they struck by the scars on the "Necanicum"; that is correct, isn't it?

A. I measured the angle more by the appearance of the "Beaver."

Q. You did not measure the angle at which they struck by the scars on the "Necanicum." That is correct, isn't it? A. That is correct.

Q. Why didn't you do it?

A. Because I thought the other way more conclusive.

Q. How could it be more conclusive—how could anything be more conclusive than the marks on the side of the "Necanicum" which was not mashed in, was it, on either side? A. No. The port side—

Q. (Intg.) Then the marks on the—

Mr. CAMPBELL.—Let him finish his answer.

A. (Continuing.) The port side, the anchor was crushed into the bulwarks.

Mr. DENMAN.—Q. Was there any injury to the anchor on the starboard side? A. No.

Q. No pressure applied at all on the starboard side that you could see? A. Not any considerably.

Q. Was there any scratches on the starboard side?

A. Only that black paint.

Q. A little paint on it?

A. There might have been some slight scratches but there was nothing mashed in.

Q. You noticed the injury on the port side of the "Necanicum" consisted of smashing the anchor into—

A. (Intg.) Into the bulwarks.

(Deposition of Alfred F. Pillsbury.)

Q. How much farther back did it run?

A. I don't know,—no damage was observed on the port side of the bow excepting what [194] was done by her own anchor. No white paint disturbed or soiled on the port bulwarks which extend above the main rail.

Q. How could you account for that?

A. Well, it is one of those things you can't account for. There should have been a disturbance on the port side as well as on the starboard side.

Q. Wouldn't you account for it by the fact that the "Necanicum" held your vessel off?

A. No, but I do account for it by the fact that with the crushing in what happened was this vessel was pulled around and she rubbed up against the side of the "Beaver."

Q. Have you seen that photograph, Captain?

A. I don't think I have.

Q. Does that corretcly describe—

Mr. CAMPBELL.—What is the number of the exhibit?

Mr. DENMAN.—Claimant's Exhibit "C."

Q. Does that correctly describe the condition of the bow as you saw it? A. I think so.

Q. Did you take this photograph, Captain, "Libelant's Exhibit 4-A"?

A. I don't think I did. I am not sure though.

Q. Will you show me on there where the water-line mark of the vessel is?

A. What do you mean by the water-line?

Q. Is there any mark on that vessel showing

(Deposition of Alfred F. Pillsbury.)

where the water stood before it was drawn off?

A. What do you mean,—when she went on the dry-dock?

Q. Yes.

A. Well, that looks something like it, about 11—whether this was or not I could not swear to it.

Q. How about this water-mark here?

A. That may be the loading mark or lower paint mark, I don't know.

Mr. CAMPBELL.—Refer to it by the exhibit number, so that the record will be clear. [195]

Mr. DENMAN.—Q. You notice in this picture “A” that there appears to be a rake back to the bow? A. That may or may not be.

Q. Do you see it appears so in the pictures?

A. Yes.

Q. Now, do you notice that there is an up-tilt to the fence on beyond A. No; that is the shed.

Q. The shed on beyond, whatever it is; that is to say, that it seems to point upward as it goes upward from the vessel?

A. That would rather indicate the whole thing was—

Q. (Intg.) Turned over? A. Yes.

Q. At an angle? A. Yes.

Q. And that the true angle of the bow of the vessel was with the top of it further forward and the bottom of it further aft? A. Yes.

Q. That would be the way it would probably be?

A. I should think so. I don't think her stem raked out at the top.

(Deposition of Alfred F. Pillsbury.)

Q. Now, I ask you whether in this picture—

Mr. CAMPBELL.—If you will refer to “4-G,” you will get a better line of the bow or the stem.

Mr. DENMAN.—Q. Now, I ask you whether this picture, Libelant’s “4-G” properly represents the angle of the stem to the water-line?

A. Well, I would not say it represents it to an exactitude.

Q. But does it appear to be right?

A. I should think so.

Q. That is, it rakes a little forward?

A. I have some of my own here. I would like to see if they give me any light. On that, it appears pretty vertical.

Q. That is taken off at an angle?

A. Yes, that is a little forward.

Q. Let me have that.

A. I think, myself, it is pretty nearly vertical, but I am not sure of that.

Q. This picture, which I will mark “Claimant’s Exhibit ‘A,’ Pillsbury,” did you take this picture, Captain? A. Yes, I think that [196] is mine.

Mr. DENMAN.—I offer this in evidence.

(The picture is marked “Claimant’s Exhibit ‘A,’ Pillsbury.”)

Q. Now, Captain, I ask you to mark on this picture the place in your opinion where the “Necanicum” first touched the “Beaver”?

A. That is all the way down?

Q. Where did she first touch her at all?

A. Right here (pointing).

(Deposition of Alfred F. Pillsbury.)

Q. Now, I want you to look at Exhibit "I" and tell me where, in your opinion, the "Necanicum" first touched the "Beaver" when she first began to scrape her? A. On that?

Q. Yes, I want your judgment on it, that is all.

Mr. CAMPBELL.—Let the Captain have an opportunity to make his answers.

A. Those are not my photographs, and I—

Mr. DENMAN.—Q. (Intg.) Well, they are photographs of the same thing, aren't they, Captain?

A. Yes, but still I am not familiar with those, in fact, I have not seen those for some time, either, and that don't give a fore and aft line very well.

Q. But you can show me on that photograph where it first touched, in your opinion, where the scratching of the "Beaver's" side first began?

A. I think it is somewhere in here; it is hard to say; somewhere in there.

Q. Now, Captain, why do you not say that the scratching first began on these heavy indentations in the "Beaver's" side, which I have marked "X" on the pictures, being "I" of Exhibit 4, leaving aside your theory of how they came together, and looking at the marks on the "Beaver," why do you say that she was not scratched at that point first?

A. Because I don't think so.

Q. Why, from the appearance of the scars, she is scratched there, isn't she.

A. I don't know that she is. [197]

Q. What caused these marks there?

A. The shoving in of the whole structure.

(Deposition of Alfred F. Pillsbury.)

Q. How do you account for the scratching of the paint and scratching of the bar and the bend in the bar just above the point "X" and the mashing of it?

A. The bend of the bar?

Q. I am talking about the bend in the bar?

A. I account for the bending of the bar by the crushing in, bending in of the whole structure.

Q. How do you account for the bending in and mashing of the bar at that point as compared with the bend to the left of the letter "X"?

A. The materials that are put under greater pressure will be distorted and take different shapes; it is hard to say what shape it might have been distorted into.

Q. It might have been struck there?

A. I don't think so.

Q. Why?

A. Because I think it was struck further out, where the greatest indent is.

Q. What objection is there to the theory that she struck there, gradually pressed in and finally caught at the point "Y"?

A. Because the place of the greatest indent would be the place where she was hit.

Q. Would that be necessarily so if she were pressing along at an angle, say, of 40 degrees from forward?

A. I don't think it would. I think—

Q. (Intg.) Now, one moment, Captain.

Mr. CAMPBELL.—Give the captain a chance to finish his answers, Mr. Denman.

(Deposition of Alfred F. Pillsbury.)

A. (Continuing.) My judgment is that the place that gets the first impact is the one that is most dented in; the others are in consequence of that.

Q. How would you then get the scratches that appear at the point [198] "X" in the paint?

A. I have stated by the distortion of the metal. On the starboard bow you will find the paint disturbed simply through the wrinkling of the plates.

Q. And the outward pressure of the bow?

A. Yes.

Q. How do you account, in view of this theory, for the general lines of scratching extending through the point marked "X" and including the double bend in the side, as shown from the photograph "A" in this exhibit?

A. The anchor of the "Necanicum" may have caused some indent there.

Q. Do you know what height the anchor of the "Necanicum" was above the water-line?

A. It was at a considerable height; I don't know how many feet.

Q. I will ask you now whether or not immediately above the port or the hawse-pipe of this anchor there appears a large indentation which looks as though it might be made by the anchor? A. Yes.

Q. Don't you think that is the most likely place where the anchor hit? A. It may be.

Q. I don't ask you "may be." Don't you think it is the most likely place, Captain? A. Yes.

Q. That is at the point "T" on "A" of Exhibit 4. Isn't that it? A. Yes.

(Deposition of Alfred F. Pillsbury.)

Q. Now, the anchor, of course, hit after the bow hit, did it not? A. It might hit simultaneously.

Q. How could it hit simultaneously if the other vessel was going ahead and there is a flare on the side of your vessel—I mean by your vessel, the “Beaver”?

A. It might not be the same fraction of an instant, but there would only be a fraction of an instant.

Q. But it would be enough for motion, would there not?

A. In a fifth of a second or a tenth of a second it would not [199] be much; it would be just a foot or two.

Q. Now, I ask you to look at the point “X”; about four feet, is it not, above the anchor mark, Captain?

A. Yes.

Q. I ask you to account for that indentation at the point “X” preceding the indentation which culminates at the point “Z” as shown by this photograph. How would you account for that, other than by a blow being struck there by the oncoming “Necanicum”? A. Why—

Q. (Intg.) If you think she was oncoming.

A. I think that could have been pulled in with the pulling in of the frames of the structure.

Q. How would it pull in and leave a bulge just beyond—

A. (Intg.) It distorts it in all sorts of shapes.

Q. Isn't it entirely conceivable that the “Necanicum” first struck there, moved along the side, and then engaged further in at the point “Z”?

(Deposition of Alfred F. Pillsbury.)

A. I don't think so.

Q. Isn't it possible? A. It may be possible.

Q. If that occurred, she would have to strike at a little higher angle than the one you came to the conclusion she struck at, would she not?

A. A higher angle than five or six points?

Q. I mean to say, a flatter angle?

A. A wider angle?

Q. No, a narrower angle. A. A smaller angle?

Q. Yes.

A. That angle is not definitely fixed; it might be anywhere from four to six points.

Q. If she struck say at four points, isn't it conceivable that she would strike at the point "X," move along—of course, she would strike this before she would strike the body of the vessel, would she not?

A. No.

Q. Do you mean to say that the "Necanicum" would hit the "Beaver" all at once?

A. All at once. [200]

Q. How do you account for that?

A. Well, the only way I can account for it, it is done in an instant.

Q. I know, but didn't I understand you to say that there was a flare out on the "Beaver's" side above?

A. Yes.

Q. Would not she strike the flare first?

A. Well, the fact that the flare didn't hold her, that she went—

Q. (Intg.) She would strike the flare and then would go on further aft and then strike the body of the vessel, would she not?

(Deposition of Alfred F. Pillsbury.)

A. It was all done in the fraction of an instant.

Q. I do not care about the fraction of an instant, but the succession, the physical succession was that, was it not? A. Yes.

Q. I ask you whether or not, placing this on a proper angle, it does not appear that the after end of the injury on the flare above, is very much forward of the after end of the injury below?

A. Not very much.

Q. How much? You can measure it, can't you, Captain? Am I fairly putting this on the after end of the injury above, as shown by your photograph?

A. That is a little extreme, perhaps; you had better pull it together.

Q. There? A. That is about it.

Q. Have I got it on both ends there?

A. Yes, I think so.

Q. Now, I am placing the dividers—is that a fair placing of it, Captain? A. I think so.

Q. What is the difference between the after end of the injuries at the shelter deck and the after end opposite the figure "9"? A. Not any to speak of.

Q. What is it in distance?

A. I don't think that when—

Q. (Intg.) Judging from this picture, I mean?

A. When I agreed with you on those measurements, I did not agree to the after part of the decking that was distorted, or the size of it, [201] because it gave way under here, and it gave way here, so I don't think there is much difference.

Q. Have you any question about the "Necani-

(Deposition of Alfred F. Pillsbury.)

cum's" side scraping back to this square line with the dots in front of it, about abaft and along the painted load line from "9"?

A. I don't thing I quite understand.

Q. Have you any question about the "Necanicum's" bow now having touched the after end of the scars aft of "9" and along the painted load line?

A. She might not have done so.

Q. What is your opinion about it, looking at the photograph, leaving aside your theory?

A. My opinion is that the stem went in a little forward of that, and this is simply pulled in as a result of that blow, and that she may not have touched that.

Q. What does it look like to you as you look at it?

A. I have given you an answer.

Q. I mean as you look at it, not your theory?

A. The picture, of course, being taken with a different shading, and different angle, they look slightly different.

Q. Now, I am asking you to take this picture and tell me whether or not in your opinion there the scars show that the two vessels struck up and down on the same line all at once?

A. At a certain point there the injury from the direct contact ceases, and then it is buckled and wrinkled, but there is not any evidence that the stem of the "Necanicum" hit where it still is wrinkled and damaged.

Q. Why, how do you account for the fact above that in one place so much of the injury seems forward of the line and in the other place it seems, so much of

(Deposition of Alfred F. Pillsbury.)

it seems, after the line. I am referring now to the line drawn through "Z" and allowing for a slightly forward rake—that is about the line, is it not, Captain, [202] from "Z" to "M"?

A. What was that question?

(The last question repeated by the reporter.)

A. It is partly due to that rake.

Q. That rake represents the position she was in in the water, does it not?

A. No, I don't think that it does.

Q. I thought you said she raked a little bit forward?

Mr. CAMPBELL.—The stem of the vessel?

Mr. DENMAN.—Yes.

Mr. CAMPBELL.—The testimony was that he thought she was pretty nearly vertical.

Mr. DENMAN.—He did not say that.

Mr. CAMPBELL.—He said in one picture it was taken at an angle; he thought it was about vertical.

Mr. DENMAN.—I think not.

Mr. CAMPBELL.—The record will show I am correct, I think.

Mr. DENMAN.—Q. Captain, you testified that the rake is fairly shown by "Exhibit G" of "4"?

A. That rake aft. It looks aft according to that. This is the reverse of that.

Q. This picture, you will see, is taken with the fence shooting up in the air, or shed shooting up in the air? A. Yes.

Q. Indicating that the position is not right, or that the picture is twisted?

(Deposition of Alfred F. Pillsbury.)

A. The picture is twisted.

Q. That being the case, I want to find out what the true rake would be. Am I drawing a line vertical to the water-line from "Z" to "M" as the position would be. A. I don't think you are quite right.

Q. Draw the water-line as you think it ought to be on that vessel, giving this a forward rake from the top down. A. Something like that.

Q. Now, I am drawing this correctly, am I not? I am now putting [203] my pointers, Captain, opposite and directly back on a horizontal line from the bow in front of the letter "5," you see.

A. Yes.

Q. I am taking the same compasses, and I am putting them above there, and I find that in order to bring the lower point at the same distance from the bow, that the upper point is, that I have to go some distance behind "Z," do I not?

A. Where was your point here?

Q. My point here was on the line that you have placed there, as being directly under "Z"; that is correct, isn't it? A. I don't know.

Q. Will you kindly draw on that photograph what you consider to be a line vertical to the water-line from the point "Z" down?

A. Which is the point "Z," right here?

Q. Yes.

Mr. CAMPBELL.—What do you mean by the water-line? Do you mean the water-line created by the water she is drawing, the load-line, or light load-line, or what?

(Deposition of Alfred F. Pillsbury.)

Mr. DENMAN.—Do you know what draft she had on that day? A. No.

Mr. CAMPBELL.—I presume you are speaking of the load-line.

Mr. DENMAN.—I am speaking of what the water-level was on the day of the collision.

Q. Now, Captain, as the vessel would lie under a normal load-line, would her bow rake aft or forward?

A. I think she is about vertical.

Q. Very well, then. Now, that being the case, will you kindly draw a line from "Z" down parallel to the bow? A. Which is "Z," this here?

Q. Yes. Will you draw it, please?

A. I would like to state before that, that there is a flare comes in here more than there [204] is down below, and that might distort it.

Q. Distort what, Captain?

A. Distort what you call a vertical line.

Q. I am asking you not above a vertical line, but I mean a line equidistant at the lower and the upper end from the line of the bow.

A. It might seem to be equidistant, and it might not seem to be equidistant.

Q. I am talking about equidistant as you look back in a straight line.

A. That is very difficult to do, with a thing that is not straight; this side of the ship is not straight.

Q. What difference does that make, Captain, with regard to a line vertical down from "Z"?

A. I think it makes a little difference.

Q. What difference; how does it make a difference

(Deposition of Alfred F. Pillsbury.)

optically? A. I imagine it does.

Q. In what way could it, if you are looking squarely on the vessel?

A. Of course, in the first place, the picture isn't in a correct vertical line.

Q. I am not talking about that—I mean the relative position of the bottom to the top at the bow and the bottom to the top at the point of the scar.

A. I have got an idea, whether correct or not, that the line here is not straight; maybe it will not show exactly when you measure it the same distance from the stem down here and the same distance down here; it might not be just the same distance.

Q. Did you make any measurements at any time to correct that? A. I did not.

Q. Did you make any measurements at any time to determine how far the lower part of the scars were aft the bow as compared with the upper scars?

A. No.

Q. You made no measurements at all?

A. I made some measurements. [205]

Q. Of those? A. No, not of those.

Q. Who was with you when you made this examination?

A. Mr. David Dickie was there on that day, on the drydock; Mr. Campbell was there, but I think he was not present when I was on deck.

Q. Did you ever go again?

A. Mr. Evers was there, Mr. Black, and Mr. Blair; I think Mr. Gardner also and several others.

Q. All employed in this same purpose?

(Deposition of Alfred F. Pillsbury.)

Mr. CAMPBELL.—I submit the question is not a fair question, and rather insinuating.

Mr. DENMAN.—Q. The same purpose Mr. Campbell referred to when he asked you whether you had been employed by him? A. I don't know.

Q. Did you all take notes together?

A. The only one that I know that took notes when I was present in reference to this is Mr. Dickie.

Q. What notes did he take?

A. I could not tell you.

Q. Did you see him making any measurements?

A. Yes, I did.

Q. Did you have a scaffolding on the side of the vessel? A. Not that day.

Q. Did you see him making any measurements any other day?

A. No. I was not present with him again.

Q. Now, Captain, if these vessels struck at right angles to the deck line, outer deck line of the "Beaver," how can you account for the fact that the port anchor made an indentation at "T" and nothing appears from the starboard anchor?

A. I don't know.

Q. You can't account for it, can you?

A. I have answered.

Q. That is a fact, you cannot account for it, can you?

Mr. CAMPBELL.—The Captain never expressed the opinion that they struck at right angles.

Mr. DENMAN.—Yes, he did, and he drew a chart showing that. [206]

(Deposition of Alfred F. Pillsbury.)

Mr. CAMPBELL.—I think he said from four to six points.

Mr. DENMAN.—I am speaking about at right angles at the center line of the vessel.

Mr. CAMPBELL.—The deck line of the vessel is parallel to the center line.

Mr. DENMAN.—Q. You simply can't account for it, Captain, can you? Would it not be accounted for by the fact that the angle to the upper deck line was much more acute than you have drawn it in this?

Mr. CAMPBELL.—What do you mean by the upper deck line, the curve of the sheer-strake—the outer edge of the sheer-strake?

Mr. DENMAN.—Yes, the edge of the sheer-strake at the top of the flare of the vessel.

Q. Is that the location of the sheer-strake, the top of the flare?

A. That is the upper sheer-strake, yes; the lower sheer-strake is on the main deck.

Q. Read the last question, now, Mr. Reporter.

(The question was repeated by the reporter as follows:)

“Q. Would it not be accounted for by the fact that the angle to the upper deck line was much more acute than you have drawn it in this?”

A. It may be.

Q. By “this,” I am referring now to the diagram “1” on an exhibit which I will call “Claimant’s Exhibit ‘B,’ Pillsbury”; would it not be accounted for possibly by the two vessels having approached at the angle marked as “T” in “2”? A. It might.

(Deposition of Alfred F. Pillsbury.)

Q. Now, presuming that they approached at the angle marked "T," I ask you why, if the "Necanicum" was dead in the water and the "Beaver" were approaching her at a high rate of speed, the two vessels might not come together and the "Necanicum" enter the [207] "Beaver" as there shown?

A. I think not.

Q. Why?

A. Because if the "Necanicum" were dead in the water and the "Beaver" hit her, the damage would be to the "Necanicum," with some slight indentation of the "Beaver."

Q. Why?

A. Because it would not be possible for the "Necanicum" to penetrate the side of the "Beaver" if she were dead in the water.

Q. Suppose the "Beaver" pushes herself onto the bow of the "Necanicum"? A. Couldn't do it.

Q. Have you ever seen it tried?

A. No. My judgment would tell me that it could not be done.

Q. Why? A. It is not possible.

Q. Have you ever run an automobile, or seen one run onto a telegraph pole?

A. No, I don't want to.

Q. Have you ever seen the side of a vessel mashed in by running against the corner of a dock?

A. Not to any extent, no. I have seen quite a number of collisions.

Q. What sort of collisions?

A. All kinds of collisions, with wharves and collisions between vessels.

(Deposition of Alfred F. Pillsbury.)

Q. What collisions, for instance, between vessels, have you ever seen?

A. Well, I have seen the "Pleiades" and "Thomas Wand."

Q. I am talking about if you have ever seen the vessels come together?

A. I don't know that I have.

Q. What is the reason—what mechanical reason or physical reason is there why if one vessel is dead in the water and lying at an acute angle to the other, and the other rams, jams her side, her bow into it, that it won't be just as successful in not pushing the bow in as if the force came from the other angle. What difference does it make?

A. Well, if it were as you state, [208] the "Beaver" would push the other one away before it would penetrate like that.

Q. If it had the same impact?

A. It would not have; it is the speed multiplied by the weight that causes it.

Q. All right, take the speed of the "Beaver" multiplied by the weight.

A. The speed of the "Necanicum."

Q. Why not the speed of the "Beaver"? Can't the on-coming vessel, with her momentum, impinge herself on a sharp bow in the same way that a sharp bow could on this vessel in the other position?

A. I don't think so.

Q. Why not?

A. Because there is one force moving, in that case.

Mr. CAMPBELL.—That is, with an object in the

(Deposition of Alfred F. Pillsbury.)

water, you are speaking of, that is movable.

Mr. DENMAN.—In either case the bow is movable.

A. In the case you speak of, there would be one stationary and the other would be moving.

Q. But it is the force at the point of impact that makes the penetration, isn't it?

A. Yes. But I should think—

Q. But suppose the "Beaver"—

Mr. CAMPBELL.—Give the witness a chance to answer. I think your attitude is most unfair in shutting him off every time he starts an answer, simply because the Court isn't present, and I shall have to appeal to the Commissioner who is taking the deposition, if you do not give him an opportunity to answer.

Mr. DENMAN.—That may be. He can protect himself pretty well—

Mr. CAMPBELL.—I will ask you, Mr. Commissioner, to give the witness an opportunity to finish his answers.

The COMMISSIONER.—It is the proper way, to get a full answer into the record. [209]

Mr. DENMAN.—That is very true, but in those cases, I have started to ask a question at the same time that he has started to give a portion of his answer, when I presumed he had finished it.

The COMMISSIONER.—Captain Pillsbury has been a little hesitant in his answers, and your questions have come in—I would not say it was intentional at all—but you are talking right along very rapidly, and the witness here is a little slow at times,

(Deposition of Alfred F. Pillsbury.)

hesitates about his answer, and does not get them in, and shakes his head. A better way to do is to get the answers in full, because the Court is not present, and we want the deposition to be as complete as it is possible to have it under the circumstances.

Mr. DENMAN.—Q. Now, Captain, your testimony on this is purely theoretical, is it? You have never seen vessels coming together in this way?

A. I should think it would be somewhat practical from the number of cases that I have seen, and dealt with, in the last eleven years.

Q. Have you ever had a case of a vessel going at 15 knots against a vessel lying dead in the water, the bow of the vessel lying dead in the water? A. No.

Q. You don't know, then, what that high momentum of a vessel would do in impacting on the sharp bow of the vessel lying dead in the water?

A. Not from the cases I have seen.

Q. Do you know of any case that you have had, that you have studied apart from this? A. No.

Q. Have you ever had a case where, to your knowledge, the oncoming vessel was impacted with her momentum at ten knots? A. No.

Q. On a vessel lying dead in the water? A. No.

Q. Can you give any reason why the oncoming vessel, with her momentum impacting on a sharp bow lying dead in the water will not drive it in in the same way that the other vessel, coming on [210] with the same momentum, would enter it?

A. Only my judgment.

Q. What is the reason on which your judgment is based?

(Deposition of Alfred F. Pillsbury.)

A. I think I have stated once or twice that a blow of that kind would only be caused by the vessel inflicting it having a large headway.

Q. I know you have said that, but you have not given any reason for it. This is a rational procedure. It is not a matter of guesswork. Why should it make any difference if at the point of contact the momentum comes from one rather than the other; what difference will it make?

A. Well, in my judgment, it would be entirely different; the nature of the damage would be quite different.

Q. You have never had any case to compare it with, have you?

A. No. I am drawing on my judgment.

Q. What is it based upon?

A. The different collision cases I have seen.

Q. What collision case have you had analagous to it?

A. I have stated I have not any exactly to compare with the one that you have stated.

Q. Then give me any single instance in your experience which leads you to believe that when an object comes against another at a sharp angle, say of 45 degrees, the momentum of the oncoming object to the impinging one, to the one that cuts in?

A. I don't see how it could—

Mr. CAMPBELL.—One moment, Captain. We object to the question as not containing a correct statement of the physical facts in this case, for the reason that it does not take into consideration the

(Deposition of Alfred F. Pillsbury.)

difference in weight of the "Beaver" and the "Necanicum," and does not take into consideration the fact that the "Necanicum" was afloat on the water, of a heavy draft aft and light forward. [211]

Mr. DENMAN.—Q. Captain, have you any idea how long it would take to stop the "Necanicum"?

A. From full speed ahead?

Q. Yes. Have you ever tried it with a schooner of that type?

A. Well, I have tried it with different vessels. I do not want to say positively. I would say in from three to four minutes.

Q. That is based upon your judgment in other cases? A. Yes.

Q. What are you assuming her headway now to be? A. Eight or nine knots.

Q. You think that a vessel of that type would stop between three and four minutes? A. Yes.

Q. That is based on your experience, Captain?

A. Yes.

Q. How long would it take to stop the "Beaver"—do you know the experiments that were made in stopping the "Beaver"?

A. No. If I did, I don't remember.

Q. How long would it take to stop the "Beaver" going at 15 knots, say?

A. I should think in the neighborhood of five minutes.

Q. Now, what ground do you think she would cover before she would stop? A. Which vessel?

Q. The "Beaver"? A. I think about 2,000 feet.

(Deposition of Alfred F. Pillsbury.)

Q. About 2,000 feet? A. Yes.

Q. Have you ever tried it?

A. I have tried it on vessels, yes, but I could not tell you offhand.

Q. Have you ever tried it on any vessel that was making 15 knots and of about the same horse-power as the "Beaver"?

A. Well, I think the "Peru" had pretty nearly the same—she was a 15-knot ship, and she had about the same horse-power, I think.

Q. Did you ever measure the distance on the "Peru"?

A. I have, but I could not tell you now.

Q. Might it not have been as much as 3,000 feet?

A. It might have been. [212]

Q. Between 3,000 and 2,000, you would not have any choice in your memory, would you? A. No.

Q. Which way would the "Necanicum" swing if she was going astern from full speed ahead to full speed astern, in reaching about a velocity of, you say, 5 knots, you have calculated she was going?

A. Well, I made that answer, yes. I don't know just what she was going; but at considerable speed.

Q. Which way would her bow turn as she went ahead but on diminished speed?

A. She would turn from port to starboard.

Q. From port to starboard?

A. I presume under these circumstances, with a moderate breeze.

Q. Presume there is no breeze at all?

A. That is what I mean.

(Deposition of Alfred F. Pillsbury.)

Q. If the breeze were aft, the tendency would be to turn less?

A. If there was a moderate breeze, it would not affect it very much; a strong breeze might affect her considerably.

Q. Then, if the "Necanicum" was proceeding at about five knots speed at the time of the collision and she must have been reversing from an eight-knot speed—presuming that she was. A. Yes.

Q. She would be turning to her starboard, would she not? A. Yes.

Q. In the water? A. Yes.

Q. I now offer you "Libelant's Exhibit 2, Pillsbury," and ask you whether, if the "Necanicum" were turning on a helm to her starboard, and proceeding at the rate of five knots, and the "Beaver" were turning to her starboard and proceeded at a rate of 10 knots, whether the two vessels ever came together as drawn here? A. No.

Q. Now, I ask you, if the "Beaver" were proceeding at the rate of 5 knots and the "Necanicum" was proceeding at the rate of 8 knots, and the "Beaver" was turning to her starboard, and the [213] "Necanicum" were going straight ahead, whether they could come together?

A. Not at the place—

Q. (Intg.) Where the collision occurred?

A. Not at the point where the collision occurred.

Q. As a matter of fact, they would be somewhere abaft, Captain?

A. It would be somewhere further aft.

(Deposition of Alfred F. Pillsbury.)

Q. Very much further aft, would it not be?

A. Yes.

Q. Might entirely miss her, might it not?

A. I don't know. I would have to measure.

Q. It would be very much further aft?

A. Quite a considerable distance, yes.

Q. Now, the "Necanicum," in order to strike the "Beaver" at all 12 feet abaft the bow from the position in which she is shown in this "Libelant's Exhibit 2, Pillsbury," would be obliged to turn considerably to her port, would she not? A. Yes.

Q. Presuming both of them were going at a five-knot speed. A. Yes.

Q. She would have to turn a great deal more, would she not, if the "Beaver" were going at 10-knots speed? A. Yes.

Q. And she would strike, instead of at right angles, at an acute angle backwards, would she not—if the "Beaver" were turning to the starboard, and the "Necanicum" were turning to port? A. Yes.

Q. So that this picture here does not at all fit into your theory. Presuming the picture to be correct now, it does not fit in at all with your theory of the motion of the vessels at the time they struck.

A. The diagram would fit in very well if the distance of the "Necanicum" was further away.

Q. What difference would it make if the angles were the same?

Mr. CAMPBELL.—Which way, further ahead?

A. Further ahead.

Mr. DENMAN.—Q. What difference would it

(Deposition of Alfred F. Pillsbury.)

make if the angles were the same?

A. I think it would fit in very well. [214]

Q. Which way would the "Necanicum" have to be turning?

A. If the "Necanicum" was on the same bearing, or off here somewhere, the "Necanicum" came up turning on a port wheel.

Q. She would have to be coming around to starboard all the time, wouldn't she?

A. She would be turning on the port wheel while the "Beaver" would be turning, to come together.

Q. In other words, the "Beaver" turns sharply to her starboard, the "Necanicum" would have to be turning sharply to her starboard in order to come together at the angle you speak of? A. No.

Q. What would the "Necanicum" have to be doing?

A. The "Necanicum" would have to be going ahead; if the "Necanicum" was off here, twice that distance or more—

Mr. CAMPBELL.—(Intg.) By "off here," you refer to a distance beyond the top of the paper?

A. Yes.

Q. Parallel to the position shown on the paper?

A. Yes.

Mr. DENMAN.—Q. Suppose the "Necanicum" continued straight ahead and the "Beaver" turned sharply to starboard, as a matter of fact, the "Necanicum" is now at an higher angle than you place her, is she not? A. In what way?

Q. At a higher angle than you placed her at the

(Deposition of Alfred F. Pillsbury.)

moment of impact? A. On this diagram?

Q. Yes.

A. I think it corresponds very closely.

Q. If the "Beaver" were turning to starboard sharply, the "Necanicum" would not strike if she went straight ahead at the angle that you have described?

A. Not unless she herself were turning on a port wheel.

Mr. CAMPBELL.—Q. By "she," you mean the "Necanicum"?

A. Yes.

Mr. DENMAN.—If she were turning on a port wheel?

A. If she were.

Q. Now, Captain, I want you to draw for me a line which, in your [215] opinion, as far as this picture indicates, would be perpendicular to the water line from the letter "Z." A. Which water-line?

Q. As the position would be under normal draft.

A. I don't know what her normal draft is.

Q. How, then, could you judge of the angle of the blow to that vessel, if you did not know what angle the bow of the "Beaver" had?

A. Why, from the general character of the injury.

Q. Well, how? How could you judge the angle by the general character of the injury? What would indicate it? A. The indent.

Q. How does the indent indicate it? Do not give a conclusion, I want the reason.

(Deposition of Alfred F. Pillsbury.)

Mr. CAMPBELL.—That is not a conclusion, that is a statement of fact.

A. Mr. Denman, I could not go to work now and analyze all the motives that made me come to the opinion that that blow was caused from an angle of 5 to 6 degrees, and I don't know, and I did not know then, that it made the slightest difference which way the angle of the blow occurred. I simply formed an opinion, and that was my opinion, without any idea as to how it would affect either case.

Q. I am not talking about that; I am not questioning about that. I want to get at your mental process, which I think was erroneous. I want to prove it, if I can; if I cannot, you have established your theory.

A. It is pretty hard to tell you in detail how I analyzed that.

Q. Were you trying at the time to discover where the vessel first struck? A. Yes.

Q. And you took no measurements to see how far back the scars were from the bottom as distinguished from the top?

A. I think I saw enough of the injury to form that opinion. [216]

Q. Well, I am asking you, did you take any measurements?

A. I took no measurements on the outside, except on the upper deck.

Q. On the upper deck? A. Yes.

Q. What measurements did you take there?

A. I took the measurements, I think, in a fore-

(Deposition of Alfred F. Pillsbury.)

and-aft line from the stem.

Q. Coming back again to the point "X": What is there behind, abaft of "X" that would make—what do you call this? A. The molding.

Q. (Continuing.) This molding bulge out and curve in at "X"? A. The pressure.

Mr. CAMPBELL.—Q. Which side does it bulge out?

Mr. DENMAN.—It bulges out aft of "X."

A. The pressure of the metal caused by the blow and the distortion.

Q. What metal would press it out and what metal would make that curve in at "X"?

A. The whole metal in connection with that.

Q. What? The whole metal is indefinite.

A. I could not tell you more in detail.

Q. Do you know? A. I think I know.

Q. What is there—there has got to be some force to press out the molding?

A. There is something pressed out here. You take that ruler, and you press in, and something is coming out, and that is what has happened, in my opinion.

Q. But how do you account for the fact that the curve-in comes before an out-curve, as you are moving from "X" to "Z"?

A. Because the vessels are tied together, in different ways; it shows that at another one it is pulled in.

Q. Did you examine it to see at that time?

A. Yes, I did.

Q. What did you see there?

(Deposition of Alfred F. Pillsbury.)

A. I saw what you see now.

Q. What did you see inside in the tying?

A. I saw a mass of twisted, bent steel and so forth, in all sorts of shapes. [217]

Q. That was about all, was it not?

A. I saw quite a lot of that.

Q. Would you say it was impossible for the vessel to have struck, scraped along, pressed along until finally she got at rest here at "Z," and at the same time she struck the body of the vessel below—do you say that is impossible?

A. I do not say it is impossible. It is not my opinion.

Q. What is the objection to it?

A. I don't know as there is any objection, but I do not want to state anything I do not think is so.

Q. Why don't you think it is so. What is the objection to that theory that she struck there?

A. Because I have the other one.

Q. That may be, but what is the objection to the theory. If those physical facts are present to the eye, there is some way of accounting for it?

A. I have stated that I cannot tell you—you cannot pick out one thing on the photograph and say that was so and so and that was so and so.

Q. What did you put the photograph in evidence for?

Mr. CAMPBELL.—Counsel does that.

Mr. DENMAN.—Why did you take them?

A. To give a general idea, I suppose. I consider them instructive as giving a general idea of the

(Deposition of Alfred F. Pillsbury.)

character of the damage.

Q. Now, I ask you whether or not it is true that from "X"—is that forward end of the injuries at that point here? A. I could not tell you.

Q. Just look at it. A. Which?

Q. This point.

A. I don't know; it may be. It looks to me as if it was more than that; that looks as though it was pulled in.

Q. I am talking about this point.

A. I could not tell you.

Q. I will ask you this, Captain: Over here was there anything [218] pulled in there as indicated by the photograph?

A. Where? Where there is a point?

Q. There (pointing).

A. I could not tell you within a few inches.

Q. Let me see your report, will you, Captain?

A. It is there.

Mr. CAMPBELL.—It is.

Mr. DENMAN.—Q. If the "Beaver" has, as you say, a flare upward, how much is that flare out, Captain?

A. I don't know in inches.

Q. In feet, isn't it?

A. I don't know the exact measurement.

Q. It would be in feet, wouldn't it?

A. It would be measured from the fine point of the ship well down.

Q. How much would you say, Captain, looking at it here, the flare was?

(Deposition of Alfred F. Pillsbury.)

A. From what point, Mr. Denman?

Q. Well, from, say, the point marked "19" at a line directly up and down from the after end of the hawse-pipe.

A. That is on the half side?

Q. Yes.

A. That is on the half width, on one side only, of course.

Q. Yes, one-half width.

A. Approximately one foot.

Q. As a matter of fact, isn't it about 2 feet and a half, Captain?

A. I would not think so, at that point; something over a foot, perhaps.

Q. Let me ask you: Will that aid you in determining the amount of the flare—I am offering to you "J" of Exhibit 4?

A. No, because this is on the shelter deck, and you are referring to the hawse-pipe.

Q. I mean up to the shelter deck.

A. I understood you to say up to the hawse-pipe.

Q. A line drawn through the hawse-pipe?

A. Oh, yes; it is approximately [219] over two feet, I should imagine.

Q. Now, that being the case, if the "Beaver" and the "Necanicum" came on at the angle you have described, what part of the "Beaver" would the "Necanicum" strike first?

A. She would strike the upper part of the "Beaver."

Q. Had you ever made any calculations to determine the interval of time between striking the upper

(Deposition of Alfred F. Pillsbury.)

and lower part? A. No, I have not.

Q. Have you ever thought of that before, Captain, in connection with this case?

A. I don't know that I have.

Q. Did you ever make any investigations to determine why, although under your theory the two vessels came together at right angles to the outer line of the shelter deck of the "Beaver," the star-board anchor of the "Necanicum" did not enter into the "Beaver"?

A. Well, I had an opinion it was a little forward, struck a little forward of a right angle; that was the reason.

Q. Then you don't think it struck the outer line of the shelter deck?

A. I think that five or six points would be a little forward of the right angle.

Q. Then your five or six points was the angle of the side of the vessel, and not to the center line of the vessel.

A. I don't mean that. Five or six points was the angle of the center line.

Q. That would make it a good deal more than right angles to the side of the vessel, would it not?

A. No, five points would not; I think five points would make it less, except possibly on the shelter deck.

Q. I am talking about the shelter deck.

A. It would probably be about right angles on the shelter deck. I considered the whole structure, not the shelter deck.

(Deposition of Alfred F. Pillsbury.)

Q. Of course, to determine at what angle they struck, and what [220] happened when they struck, you would have to consider not only the whole structure, but each part of the structure, would you not? A. I should think so.

Q. What is the flare, Captain, of the vessel between the point marked "T" and the point marked "X"?

A. Which is "T"?

Q. "T" is there, and the "X" is above.

A. I think it is about—maybe I have the measurement.

Q. Is the hawse-pipe below or above the main deck?

A. I think it is above the main deck. I think there is the indent—I can't tell you about that, I haven't the measurement.

Q. May I take a look at your book, please, Captain? A. Yes.

Q. I notice here, Captain, that you say the following: "Had the 'Necanicum' hit the 'Beaver' on a more fore and aft position, the paint would be scratched all away to the 'Beaver's' stem, whereas the last four feet between the stem and indent is not scratched." How about the first six feet between the stem and the indent?

Mr. CAMPBELL.—That is beginning with the stem? A. No, with the break.

Mr. DENMAN.—Q. It must have been scratched, according to this note.

A. I suppose I referred to the anchor that is

(Deposition of Alfred F. Pillsbury.)

scratching, but that anchor is out about six feet from the stem.

Q. Would you call that scratching paint? Is that anchor indentation fairly described as scratching paint—on “A” of “Libelant’s Exhibit 4,” is the anchor indentation at “T” what you would call scratching paint? A. No, that is an indent.

Q. Now, when you say here that the paint is not scratched for the last four feet, what about the paint being scratched for the other six. It must have been scratched, must it not? [221]

A. It might have been.

Q. Would you make any other note in your book than this if it had not been scratched?

A. No, I don’t know that I would.

Q. The whole reasoning of this is that she scraped along the side for six feet, and scratched the paint, but had not scratched the first four feet from the bow aft; that is it, isn’t it?

A. I don’t know that it is.

Q. Isn’t that the reasonable interpretation of it?

A. It may be.

Q. Isn’t it a fairly reasonable interpretation of it?

A. There might be another. It might be that the pulling in of those plates would tear the paint off.

Q. Would you call that scratching?

A. I hardly expect I would; still, the paint would be all disturbed there where they are bent in.

Q. But you are here trying to describe the motion of the ship, aren’t you: “Had the ‘Necanicum’ hit the ‘Beaver’ on a more fore and aft position, the

(Deposition of Alfred F. Pillsbury.)

paint would be scratched all the way to the 'Beaver's' stem."

A. I could interpret that this way: If she had hit her on a more fore and aft position, that with the round of that bow, it would have come up against the side of the "Beaver" in parts that were not disturbed by the pulling in of the plate.

Q. But you were not using the term "scratching" in connection with that.

A. I might or might not. I think the idea of putting it in that way was to show that had she come fore and aft more the paint all the way forward would have been disturbed.

Q. Now, Captain, just look at the angle shown in this drawing that you have made in your note-book of November 1, 1913. It would appear that the "Beaver" had run onto the "Necanicum" at rather a high angle, would it not, or rather a flat angle?
[222]

A. That the "Beaver" had run on to the "Necanicum"?

Q. That the two vessels had come together then at rather a flat angle.

A. Rather a high angle,—what is your idea of a high angle?

Q. I mean to say,—I am marking now on this exhibit that has not been offered in evidence yet, unless you are willing to let it go in.

A. I would rather it not go in; I would rather detach the pages and number them.

Q. I would like to have them put in.

(Deposition of Alfred F. Pillsbury.)

Mr. CAMPBELL.—If you will take the book, Captain, and pin together the leaves which refer to this matter, may we extract them from the book?

A. Yes.

Mr. DENMAN.—Q. How many reports of this did you write up, Captain?

A. I don't remember; three or four, I don't remember.

Q. Where are the others?

A. I think Mr. Campbell has them all.

Mr. DENMAN.—Will you let me have the others, Mr. Campbell?

Q. You mean copies of different reports?

A. Just copies of that one report.

Q. Did you write up a preliminary report, and then a second one? A. No, just that one.

Q. That is the only report that has ever been made?

A. Yes.

Mr. CAMPBELL.—You mean that you had several copies made of the same report? A. Yes.

Mr. DENMAN.—I didn't know whether he had a preliminary report and a subsequent one as he went along. A. No.

Mr. CAMPBELL.—I ask that counsel hasten the deposition as much as possible, because he appreciates that the Captain has got to leave on the 8:20 train, and it is now after six o'clock. [223] I do not want to think that you are doing it on purpose, but I think you are unduly prolonging the examination; you appreciate that the Captain has got to go away. It places me in rather an embarrassing posi-

(Deposition of Alfred F. Pillsbury.)

tion to so embarrass the Captain in his matters.

Mr. DENMAN.—I am very sorry for that. We are trying a lawsuit, and we want to get the evidence in.

Mr. CAMPBELL.—I appreciate that, but I would like you to hasten it as much as possible.

The WITNESS.—I understand the situation.

Mr. DENMAN.—I want to get you off if I can.

Mr. CAMPBELL.—How soon, Captain, do you have to leave?

A. In twenty or twenty-five minutes.

Mr. DENMAN.—Q. You must leave in twenty or twenty-five minutes? A. Yes.

Q. Captain, if as indicated in your note there, the “Necanicum” had scraped along your bow, the “Beaver’s” bow for a distance of six or eight feet before she actually engaged deeper, to the deepest point, and had pressed the “Beaver” in in the way as appears on page 4 of your notes, and the “Beaver” were going ahead, what would it do to the course of the “Necanicum”—what way would it turn the head of the “Necanicum”?

A. It would turn the head of the “Necanicum” toward the bow of the “Beaver.”

Q. Which way would it turn it? A. To port.

Q. Turn it to port? A. Yes.

Q. Now, if the “Beaver” and the “Necanicum” were, at the end of a minute or half a minute, say a minute after the collision, practically on a parallel course, during which time the “Necanicum” was reversing and turning toward her starboard, you would

(Deposition of Alfred F. Pillsbury.)

expect to find a very considerable turning force to have been [224] applied to the bow of the "Necanicum" to bring them around parallel, would you not? A. Yes.

Q. No force in the "Necanicum" would contribute to that turning, would it? It would have to be the force of the "Beaver," would it not?

A. Yes, I think so.

Q. Where would the "Necanicum" pivot where she was turned in that way? A. On the heel.

Q. That does not mean exactly on the heel, itself? Where would the point be, presuming she had a draft of five feet forward and 16 feet aft—where would the pivoting point come?

A. Pretty close to the stern.

Q. It would be about under the engines, would it not? A. About there.

Q. Would that tend to confirm your theory that the "Beaver" was making ten knots?

A. Thereabouts, a good speed; it might have been eight, it might have been twelve.

Mr. DENMAN.—I offer the Captain's notes in evidence as "Claimant's Exhibit 'C,' Pillsbury."

Mr. CAMPBELL.—No objection.

Mr. DENMAN.—Q. Page 4 of your Exhibit "C" represents approximately the injury as you found it?

A. Yes.

Q. And the angle? A. Yes.

Q. Is there any photograph of all these that were taken that indicates that angle?

A. I did not take these.

(Deposition of Alfred F. Pillsbury.)

Q. I know that, but I ask you if any of them does.

A. This one here would.

Q. That would?

A. Yes, "H" on "Libelant's Exhibit 4."

Q. In other words, in that, the deeper part of the wound is at the after end of the wound?

A. Near the after part of the wound.

Q. That is correct, isn't it, Captain? A. Yes.

[225]

Q. How does that indicate in the photograph that it is deeper at the after part of the wound?

A. These photographs, owing to the light, do not bring it out.

Q. Don't bring it out? A. No.

Q. There is no photograph in all these that brings that out, is there? A. I think not.

Q. Did you take any that brings it out?

A. Well, that brings it out pretty well, "Pillsbury Exhibit 1."

Q. Does that not show very much the face of the after side than it does the fore side?

A. I don't know that it does.

Q. Take your calipers and take a fair sight of that.

A. It is sharper owing to the angle it was taken.

Q. Exactly, but as you look at it, it looks as though the after portion of the scar was very much larger than the fore portion, as you look at it? A. Yes.

Q. Is there any other picture that you know of that has been taken? A. Not unless I have it here.

Q. Look at them.

A. Owing to the light, they would not come out;

(Deposition of Alfred F. Pillsbury.)

there were several taken there on that angle that did not come out, that did not show the details.

Q. Is there any taken looking from aft forward?

A. I do not see any. Some taken at broadside.

Mr. CAMPBELL.—I call your attention to the photograph which was taken from the ship's fore-top. See whether that answers.

Mr. DENMAN.—No.

Mr. CAMPBELL.—Let the Captain answer, and not Mr. Denman.

A. There is one taken from the mast.

Mr. DENMAN.—Q. That shows the after end of the wound to be very much larger than the other end, does it not, from that position?

A. From that position; yes. [226]

Q. That is correct, isn't it?

A. As it shows here?

Q. Yes. A. Yes.

Q. Is there any picture taken from aft the wound on the outside, to show the relative length of the fore portion of the wound as compared to the after portion? A. I don't know that there is.

Q. None taken?

A. If there was, they are all here.

Q. You don't know of any being taken, do you?

Mr. CAMPBELL.—Does it bring it out in detail other than as shown on the large photograph "Exhibit 4" and "Pillsbury Exhibit 1"?

Mr. DENMAN.—Both of those were taken from a spot forward. Neither was taken from aft of the wound. Q. Now, I am asking you whether you re-

(Deposition of Alfred F. Pillsbury.)

call any photograph that was taken aft of the wound on the outside. A. I don't recall it at this time.

Q. Now, Captain, I am showing you a picture taken by you, which I will mark "Exhibit 'D,' Pillsbury," and I recall to your mind the remarks you have made in your notes concerning the scraping of paint, and ask you whether it is not possible that you meant by that the scraping of paint from what appears to be the forward part of the scar under the hawse-pipe back to the center of the wound? A. Possibly.

Q. Quite likely, isn't it, Captain?

A. Well, I would say it was possible.

Q. And the same thing may be true from what appears to be the first indentation above, just above a little bit forward of the anchor wound, back to the center of the wound itself? A. I don't think so.

Q. Now, I ask you whether the scraped appearance of the paint from "X" to "Z" may not be the scratching that you refer to?

A. It is possible. [227]

Q. And that you thought of that at that time as being scratched? A. That is possible; it may be.

Q. You think it is possible, too, that the anchor projected out far enough to engage the "Beaver" first? A. No, not first.

Q. What makes you say that? Did you make any measurements of the anchor?

A. Well, that is my judgment.

Q. Well, I say, did you make any measurements of the anchor on the "Necanicum"?

A. No. I think the point of the stem made the first contact.

(Deposition of Alfred F. Pillsbury.)

Q. By the way, how much was taken off the stem?

A. Practically all.

Q. When you say practically all, what do you mean by that?

A. It was practically smashed right in to the end.

Q. Straight back? A. Yes.

Mr. CAMPBELL.—Captain, due to the fact that there is a great lapse of time running between each question and the time is so close for you to go, I want you to say when you have got to go, and I will ask the Commissioner to adjourn the deposition and take my chance of having the Court permit me to complete it after your return following the conclusion of the case.

The WITNESS.—I think I ought to leave not later than ten minutes from this time.

Mr. CAMPBELL.—I do not want to think that you are deliberately prolonging this examination, but you are prolonging it with very slow interrogations.

Mr. DENMAN.—That may be, Mr. Campbell, but—

Mr. CAMPBELL.—I trust that I won't be forced to feel that way, but you knew when I called you at two o'clock that the Captain had to get away at 8:30, and you have been two hours in your cross-examination now. [228]

Mr. DENMAN.—I think if I had him on the stand, I am quite sure I would be a day. I would also call to your attention, despite your petty remarks that you have made, on account of the absence of your

(Deposition of Alfred F. Pillsbury.)

dinner, probably, that I desired to have the examination begin earlier to-day; I offered to go on at 3:00 o'clock to accommodate you, and I told you it would be an accommodation to me at the same time.

The COMMISSIONER.—We are losing this time.

Mr. DENMAN.—But my friend has put things into the record that are rather offensive.

Mr. CAMPBELL.—They are not intended to be offensive at all.

Mr. DENMAN.—There is no use of repeating something that is offensive, if you don't mean it.

Mr. CAMPBELL.—If you mean to be sharp, whatever I say I mean. It is not intended as anything offensive at all, but the Captain is anxious to get away, and it is embarrassing to me to have him delayed.

Mr. DENMAN.—I am very sorry for that, but I intend to work out in my own mind the various movements of these vessels with reference to the captain's testimony.

Q. Now, as I understand it, Captain, you say the bow of the "Necanicum" was smashed square back.

Mr. CAMPBELL.—He hasn't so testified, at all.

A. I say the stem was practically destroyed.

Mr. DENMAN.—Q. It was mashed right back. I want your recollection without the exhibits, or without any other suggestion. A. Yes.

Mr. CAMPBELL.—I suggest that counsel is putting something into the witness' mouth that he has not, said, that it was mashed square back. [229]

Mr. DENMAN.—Q. You said it was?

(Deposition of Alfred F. Pillsbury.)

A. I said it was practically destroyed, splintered and mashed up.

Q. You also said it was mashed square back.

A. If I did, I suppose it is in the record.

Q. Is it so? I mean to say, is that your memory of it now?

A. Well, I said it was practically broken up all the way.

Q. I am asking you as to the direction: Was it broken to one side?

A. Broken to port, pushed to port.

Q. It was turned to port? A. Yes.

Q. That is scraped over toward the port side?

A. Bent over to port.

Q. It was scaped over to the port, was it not?

A. I would say bent.

Q. I ask you whether or not in fact of the condition of the bow in Exhibit "C" of claimant, you will deny that it was not scraped to the port side?

A. You and I may mean the same thing. I say bent and stick to it.

Q. But it was gradually torn out and crushed in that direction?

A. Not gradually crushed, but it was mashed and bent over to port.

Q. If this was a single impact, a single direct in-drive, how would you account for that turning over to port.

A. That is just the way I do account for it, by going in with a crushing blow and breaking it up, and the forward movement of the "Beaver" twisting it

(Deposition of Alfred F. Pillsbury.)

around at the same time.

Q. But if it went directly into the "V" and did not scrape back at all to port, how would you get that effect?

A. As I say, the forward movement of the "Beaver" at the same time she was hitting.

Q. Well, she must have scraped along the side of the "Beaver," [230] must she not?

A. No, she did not scrape alongside.

Q. How, then, would the forward movement of the "Beaver" tear that back unless it engaged the "Necanicum" as it moved forward and scraped it back toward the port?

A. It didn't scrape it back. When the "Necanicum" hit the "Beaver" with a good deal of way, the "Beaver" was also going with a good deal of way, the two forces broke it up and turned it to port.

Q. Looking at this injury, would you say that the injury could or could not be inflicted with a vessel lying still and the other vessel striking her at 15 knots? A. Decidedly could not be.

Mr. CAMPBELL.—That is referring to what exhibit?

A. It could not be so splintered up if she was lying still.

Mr. CAMPBELL.—That is referring to Claimant's Exhibit "C"? A. Yes.

Mr. DENMAN.—Q. Suppose she was going at 30 knots?

A. I don't know what would happen. I have never seen a vessel making 30 knots.

(Deposition of Alfred F. Pillsbury.)

Q. But you have said you never saw a collision with a vessel going 15 knots and the other vessel lying still?

A. Well, I have seen vessels that were going 10 or 12 knots or more.

Q. Have you ever seen it where there was a bow like that before? A. No.

Q. You don't believe, then, if the "Beaver" struck that going 15 knots, that it would turn the bow over like that, if she was lying dead in the water?

A. No.

Q. Your theory is based on some notion that an object cannot drive itself on to another as fast as the other can drive it into that object? [231]

A. In reference to that condition there, my opinion is based on that condition—splintering that wood. If the "Beaver" alone had headway, it would not have been so splintered up.

Q. Why wouldn't it be?

A. It would be broken in one or two pieces.

Q. I see you do not understand my question. We will have to put this over, Mr. Campbell. Suppose that the "Necanicum" is lying at rest here like that, and the "Beaver" drives across her bow at 15 knots.

A. Yes, she would simply turn the stem over and it would not be splintered up.

Q. Suppose in doing that, as she does it, she engages, presses in the side of the "Beaver" and she catches, so that it gets at an angle like that marked at the point "T" and forces the "Necanicum" back with a great pressing motion of her momentum at 15

(Deposition of Alfred F. Pillsbury.)

knots ahead, would you then say she would not mash?

A. Yes.

Q. That is very satisfactory. I will offer this in evidence and ask to have it marked "Claimant's Exhibit 'E,' Pillsbury."

Q. Now, the exhibit that you have just given your testimony on, Captain, is this "Claimant's Exhibit 'E,' Pillsbury," that I have before me, isn't it?

A. Yes.

Q. And it is your contention that if the "Beaver" coming down at 15 knots should strike the "Necanicum" and engage her bow in a "V" formed by the formation of every portion of the structure of the "Beaver" that the mashing effect of the forward movement of the "Beaver" could not splinter it up in the finest splinters?

Mr. CAMPBELL.—What would not splinter it up?

Mr. DENMAN.—Q. The stem of the "Necanicum"?

A. Well, it was also stated that the "Necanicum" was stopped, was it not. [232]

Q. Presuming she is stopped? A. Yes.

Q. And the momentum comes from the other vessel? A. Yes.

Redirect Examination.

Mr. CAMPBELL.—Q. Is the stem of the "Necanicum" vertical? A. No.

Q. Where is the furthest point forward, at the top of the stem or at the bottom?

A. Well, in her light condition, it was not vertical;

(Deposition of Alfred F. Pillsbury.)

it might be with the vessel loaded within a foot or two of an even keel, but in the condition she was in, the stem raked up so that the top of the stem was a foot back of the part lower down, say 12 or 15 feet lower down. I don't remember now.

Q. Now, referring to the drawing made on your notes, I ask you whether or not you have attempted to draw the lines with absolute accuracy?

A. As they appeared to me.

Q. Does it or does it not follow in your judgment that all the paint which was off the iron work on the "Beaver" in and about her damage was due to scraping by the "Necanicum" against the iron?

A. No.

Q. How else could the paint have been removed?

A. By the buckling and banding of the painted metal.

Q. Is or is not that a common condition with metal that is under a bending strain?

A. That is very common.

Q. What can you say of the fullness of the bows, the comparative fullness of the bow of the "Necanicum" to that of the "Beaver"? A. It is fuller.

Q. If the angle of approach had been more acute than that which you have drawn, taking into consideration the full bow of the "Necanicum," I ask you whether or not in your judgment the damage which would have been inflicted upon the "Beaver" in a collision [233] with the "Necanicum" when the later would have been dead, would have been of the character which the "Beaver" did receive?

(Deposition of Alfred F. Pillsbury.)

A. If it had been much more acute they would have simply rubbed by.

Q. Would the same character of damage have been done to the "Beaver"?

A. What do you mean by much more acute?

Q. I mean if considering they were approaching at the angle of impact which you gave, the "Necanicum" was more nearly to a parallel line?

A. One point would not have made much difference, I do not believe. None of us know exactly whether it was 4 or 6 points; but if it had between 2 and 3 points, I think they would have rubbed by.

Q. As the angle of impact lessens, what effect would the fullness of the bow of the "Necanicum" have upon the tendency of the two vessels to simply scrape along each other?

A. That would have a tendency—the tops, the bows of each vessel, the upper deck of each vessel would rub along, the stems would hardly touch.

Recross-examination.

Mr. DENMAN.—Q. Captain, there is a point where the vessel might scrape along for a few feet and finally something give and she enter, is there not? That is to say, presuming she strikes, where the structure of the vessel is strong, she will scrape along until she strikes a weak point which will give; that is conceivable?

A. Yes, provided the angles are not too nearly opposite each other.

Q. That is a conceivable method of this collision?

(Deposition of Alfred F. Pillsbury.)

A. That is conceivable.

Q. It is not utterly unreasonable, is it? A. No.

Mr. CAMPBELL.—Does that imply headway on the part of the [234] part of the “Necanicum” at the time of the impact?

A. Yes, decidedly. [235]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that on Monday, October 19, 1914, in pursuance of the notice and order of court filed in the above-entitled cause, at the office of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Alfred F. Pillsbury, a witness produced on behalf of libelant in the cause entitled in the caption hereof, and Ira Campbell, Esq., appeared as proctor on behalf of the libelant, and William Denman, Esq., appeared as proctor on behalf of the claimant, and that the said witness being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the said deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the attorneys

the reading over of the deposition to the witness and the signing thereof was expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the Clerk of the United States District Court for the Northern District of California, for whom the same was taken. [236]

And I do further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

Accompanying the said deposition and annexed thereto, and forming a part thereof, are Libelant's Exhibits 1 and 2, and Claimant's Exhibits "A," "B," "C," "D," and "E."

IN WITNESS WHEREOF, I have hereunto set my hand at my office aforesaid this 21st day of October, 1914.

[Seal]

FRANCIS KRULL,
United States Commissioner Northern District of
California, at San Francisco.

[Endorsed]: Filed Oct. 21, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [237]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

Before Hon. MAURICE T. DOOLING, Judge.

No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

Libelant,

vs.

The Steam Schooner "NECANICUM," Her Tackle,
Apparel, etc.,

Claimant.

No. 15,675.

LEGGETT STEAMSHIP COMPANY, (a Cor-
poration),

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

Claimant.

(Testimony Taken in Open Court.)

Thursday, October, 15, 1914.

APPEARANCES:

For San Francisco & Portland Steamship Co.: IRA
CAMPBELL, Esq.

For Leggett & Company: WILLIAM DENMAN,
Esq.

Mr. CAMPBELL.—There are two suits, if your
Honor please, one by the San Francisco & Portland

Steamship Company against the steam schooner "Necanicum" and the other by the Leggett Steamship Company, the owner of the "Necanicum," against the San Francisco & Portland Steamship Company, and by the consent of counsel, these cases will be consolidated for trial. They arise out of [238] the same collision. I represent the San Francisco & Portland Steamship Company, the owner of the steamship "Beaver."

Mr. DENMAN.—I will ask a sequestration of the witnesses during the course of the trial.

The COURT.—All of the witnesses will be excluded from the courtroom except the one testifying.

Mr. CAMPBELL.—On October 30th, 1913, the steamer "Beaver," a regular passenger liner of some 4,000 or 5,000 tons, plying between here and Portland, was coming down the coast, and shortly after noon of that day, passed Point Arena, and continued on her course to the next point of her journey, which would be Point Reyes; as she passed Point Arena, or shortly after passing Point Arena, the fog became intermittent, at times it would set in and at times it would lift, so that they could see ahead and inshore or offshore a distance of several miles. Our evidence will show that about 2:14, or shortly before 2:14, the second officer, who was in charge of the navigation of the "Beaver," called the master to the bridge, saying that it had the appearance of getting foggy. The master came onto the bridge, and shortly after that the lookout reported a steamer ahead, or slightly on the "Beaver's" port bow. At that time, it was estimated by those on the "Beaver"

that this steamer, which afterwards proved to be the "Necanicum," was from a mile to a mile and a half distant, and she was bearing nearly dead ahead, or to one side or the other slightly on the port bow, perhaps two or three degrees. They continued to approach each other. But very shortly after having sighted them, the master of the "Beaver" blew one whistle, indicating it was his desire to pass, for the steamers to pass port to port, that is, he should turn his steamer to starboard and the "Necanicum" should turn to the [239] starboard. Thereupon, he ordered his helm to port and it was done. No reply was received to the one passing whistle, and a second passing whistle was blown to the "Necanicum," which was answered with one passing whistle, indicating an acquiescence in that maneuver, but instead of turning in the direction called for by the whistle, the "Necanicum" starboarded her helm and turned toward the "Beaver." That is to say, the "Beaver" turned this way and the "Necanicum," instead of turning that way, turned toward her, and the two vessels came together, the "Necanicum" striking the "Beaver" about 25 feet abaft the "Beaver's" stem on her port bow; the angle of impact was from 45 to probably 60 degrees; some of the witnesses even think it was nearly at a right angle. That, in brief, is the case that we expect to make out.

Mr. DENMAN.—I suppose your Honor would like to know what our case is. We claim that the fault in this case was on account of the excessive speed on the part of the "Beaver," which was com-

ing down the cost on its regular run, keeping its regular passenger schedule, that when the boats came in sight out of the fog, the "Beaver" was on our starboard side; that is, we were on her starboard bow; and in that position it was her duty to blow two whistles and to proceed in passing us starboard to starboard; instead of doing that, she blew one whistle, an error, and crossed our bows, and we, although reversing and going astern at the moment of the collision, were run into by her, her port bow striking us squarely at an angle of say 45 or 50 degrees, crossing our bow, and turning the nose over and driving in the anchor on our port side into the side of the vessel; the faults we claim are excessive speed in the fog, the blowing of one whistle, and giving the wrong turn to the helm on the part of the "Beaver" at the time she should have blown two whistles, and [240] turning in the opposite direction, passing us to our starboard.

Mr. CAMPBELL.—Do you plead in your libel our excessive rate of speed in the fog?

Mr. DENMAN.—Yes, I have.

Mr. CAMPBELL.—It is not my recollection, if the Court please. The depositions which were taken, which undoubtedly will be offered in evidence, show the condition of the fog to be about as I have described.

Mr. DENMAN.—If your Honor please, in order that there be no question about the condition of this case, this libel alleges as follows, which was answered by our opponent, and denied:

"That thereafter and at about the hour of 2:15

(Testimony of E. W. Mason.)

o'clock P. M., and while proceeding at a moderate rate of speed, the lookout and the officers in charge sighted the steamer 'Beaver' proceeding through the fog at a very high rate of speed, to wit, 15 knots or thereabouts."

Testimony of E. W. Mason, for Libelant.

E. W. MASON, called for the libelant, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. E. W. Mason.

Q. What is your age? A. 40 years of age.

Q. What is your business, Captain?

A. Master mariner.

Q. Of what steamer are you now master?

A. The steamship "Beaver."

Q. Of what steamer were you in October, particularly on October 30, 1913?

A. The steamship "Beaver."

Q. What is the size of the "Beaver"?

A. 2779 net tonnage.

Q. What are her dimensions?

A. 380 feet in length over all; 57 feet beam.

Q. And her draft? A. About 21 feet.

Q. What character of vessel is she?

A. A first-class passenger [241] ship.

Q. When and where was she built, if you know?

A. Newport News, 1910.

Q. Where does she ply?

A. Between Portland, Astoria, San Francisco and Los Angeles.

Q. Has she always been engaged in that business, since she has been on the coast? A. Yes.

(Testimony of E. W. Mason.)

Q. How long have you been master of her?

A. 2 years and 6 months.

Q. What are her passenger accommodations?

A. 571 passengers.

Q. I hand you a photograph, and ask you of what it is a photograph? A. The steamship "Beaver."

Q. Taken bow on? A. Yes.

Q. At what time?

A. Taken while in the drydock.

The COURT.—Q. After the accident?

Mr. CAMPBELL.—After the accident. I personally happen to know this, of course; it was taken at the Union Iron Works drydock or Hunters Point drydock on the day that she was docked following the accident; but I simply offer it in evidence to give the Court an idea as to the type of ship that she is.

(The photograph was marked "Libelant's Exhibit 1.")

Q. Were you the master of the steamer "Beaver" at the time of the collision with the steam schooner "Necanicum"? A. Yes.

Q. Where were you at the time of the collision?

A. On the bridge.

Q. Whereabouts, as near as you can give it, did the collision occur?

A. 21 miles south of Point Arena.

Q. Do you know what time your vessel had passed Point Arena? A. Yes.

Q. What time? A. 12:52.

Q. What was the condition of the atmosphere at the time? [242]

(Testimony of E. W. Mason.)

A. A light fog prevailed, high fog.

The COURT.—Q. A light high fog?

A. Yes, sir.

Mr. CAMPBELL.—Q. Were you able to see the lighthouse at Point Arena?

A. No, not the lighthouse.

Q. Could you see anything of the land?

A. Yes.

Q. What portion of it?

A. You could see the Point.

Q. At what distance off Point Arena did you pass?

A. $2\frac{1}{2}$ miles.

Q. $2\frac{1}{2}$ miles off? A. Yes.

Q. What course had you been steering at the time you passed Point Arena, at the time you reached Point Arena?

A. Southeast by half south magnetic.

Q. Where had been your last point of departure?

A. Blunt's Reef Lightship.

Q. When you had Point Arena abeam, did you then make a change in course? A. No.

Q. What course did you follow?

A. I steered the same course for ten minutes, or $2\frac{1}{2}$ miles.

Q. Why was that?

A. Well, the ship set in and we run down to Arena Cove before we hauled down, which would give us our proper distance off Point Arena.

Q. When did the ship set in, at what time?

A. She set in from the view of the land.

Q. But during what portion of your course did she set in?

(Testimony of E. W. Mason.)

A. Well, previous to reaching the point.

Q. From Blunt's Reef to the Point? A. Yes.

Q. How far did you continue to run on your course past Point Arena? A. Ten minutes.

Q. Did you make any alteration in your course at that time?

A. At that time, yes, we held her down to the regular course for [243] Point Reyes.

Q. What was that?

A. Southeast half east magnetic.

Q. What course was your vessel on at the time you first knew of the presence of the "Necanicum?"

A. Southeast half east.

Mr. CAMPBELL.—While we are on that portion of the case, if your Honor please, I would like to have the witness lay down the course from the chart. It will take but just a moment.

Mr. DENMAN.—What do you mean by the ship "setting in"?

A. The current sets along the coast.

Q. Inshore?

A. Yes. In southerly weather we looked after that, during all the southerly part of the year, we have that.

Mr. CAMPBELL.—Q. Will you come here and take the dividers and lay down the course she was running at the time that you passed Point Arena, your change of course and the course on which you were running at the time of the collision?

The COURT.—Do you start that first course from Blunt's Reef?

(Testimony of E. W. Mason.)

Mr. CAMPBELL.—We cannot on this chart. He has given the distance off Point Arena at which he passed on that course. If the Court would like it, I could procure the chart above.

The COURT.—No, I just wanted to have the regular line pointing toward Blunt's Reef.

Mr. CAMPBELL.—Q. Will you mark in here the direction of your course above Point Arena?

A. Yes, sir. Here it is.

Q. What were you steering?

A. Southeast one-half south.

Q. Magnetic? A. Yes.

Q. And that, as I understand, was from Blunt's Reef? A. From Blunt's Reef to that line.

Q. The point "A" is where?

A. The point abeam, the lighthouse abeam. [244]

Q. Where on this chart is shown the point at which you next made your change? A. Right here.

Q. Where I have marked "B"? A. Yes.

The COURT.—A few minutes after passing the lighthouse? A. Yes.

Mr. CAMPBELL.—The course "A-B" is southeast one-half south, magnetic?

A. Yes, I took that course right down.

Q. On what course were you at the time you first became aware of the presence of the "Necanicum"?

A. Southeast one-half east.

Q. Magnetic? A. Yes.

Q. Can you indicate upon the line the approximate point of the collision? A. Yes.

Q. At what time did the collision take place?

(Testimony of E. W. Mason.)

A. 2:18.

Q. Will you indicate upon the chart approximately the point at which you fix the collision?

A. We ran 21 miles from Point Arena.

Q. You indicate it. Have you indicated upon the chart the approximate point that the collision happened? A. Yes.

Q. Where is it? A. Right here.

Q. Where I have marked the letter "C"?

A. Yes.

The COURT.—Q. Is that the point of collision?

A. Yes.

Mr. CAMPBELL.—Q. That, you say, is 21 miles south of Point Arena? A. Point Arena, yes.

Q. By the word "south," you mean magnetic south, or southerly? A. South or southerly.

The COURT.—Do you mean 21 miles from Arena on that course? A. Yes.

Mr. CAMPBELL.—I offer that chart in evidence. (The chart is marked "Libelant's Exhibit 2.")

Mr. CAMPBELL.—Q. At what time did you go on the bridge of [245] your steamer prior to the collision?

A. Shortly after 2 o'clock, about five minutes past two.

The COURT.—Q. About five minutes past?

A. Yes.

Mr. CAMPBELL.—Q. Where were you before going on the bridge?

A. I was sitting in my room, having my lunch.

Q. Where is your room with respect to the bridge?

A. Directly underneath it.

(Testimony of E. W. Mason.)

Q. How did you gain access to the bridge?

A. With a ladder, a ladder on each side.

Q. There is no stairway from your room to the bridge? A. Yes.

Q. From the interior of the room, is there a stairway to the bridge? A. No.

Q. How did you happen to go on the bridge at that time?

A. The second officer, who was on duty, reported to me it looked like it was going to set in foggy.

Q. Thereupon you did what?

A. I immediately went up on the bridge.

Q. What condition of the atmosphere did you find existing at that time?

A. I could see three or four miles.

Q. Three or four miles? A. Yes.

Q. Thereafter, did it begin to thicken?

A. Yes, coming down in light, drifting.

Q. At approximately what time did you first know of the presence of the "Necanicum"?

A. At 2:14 I first sighted her.

Q. How was your attention called to her; that is to say, did you see it yourself, or was it reported to you by anyone?

A. It was reported; when the lookout-man reported it, at the same instant I seen it.

Q. Prior to your sighting the "Necanicum," I ask you whether or not the "Beaver" had been blowing any fog whistles. A. Yes.

Q. What kind of a whistle is the "Beaver" equipped with? [246]

(Testimony of E. W. Mason.)

A. She is considered to have the best whistle—the “Bear” and “Beaver” are considered to have the best whistles on the Pacific Coast, loudest, strongest—

Q. (Intg.) What size whistle?

Mr. DENMAN.—I move that that go out.

Mr. CAMPBELL.—Let it go out.

Q. What size whistle has the “Beaver”?

A. I don’t know the diameter of the whistle, about 3 feet long.

Q. About 3 feet? A. Yes.

Q. How does it compare in size with the whistle on other vessels on this coast?

A. Well, it is much larger than any of the vessels outside of the “Yale” and “Harvard”; the “Yale” and “Harvard” and “Bear” and “Beaver” are considered to have the best whistles on the Pacific Coast.

Q. I am asking you about your knowledge, not about what is considered.

A. That is what we find, hearing the other whistles from other vessels, we have the strongest whistle of any.

Q. Were you master of any other vessel or any vessel prior to your going on the “Beaver”? A. Yes.

Q. While you were on the other vessels, did you ever pass the “Beaver,” so as to hear her whistle?

A. Yes.

Q. What kind of a sounding whistle has she?

A. She has got a shrewd, coarse whistle, that can be heard for at least three or four miles.

Q. Were you on board the “Beaver” at the time of her collision with the “Selja”? A. No.

(Testimony of E. W. Mason.)

Q. How was the "Beaver's" whistle operated at the time she was blowing the fog whistles prior to 2:14? A. The automatic whistle was blowing.

Q. What do you mean by the "automatic whistle"? [247]

A. That is an attachment that is onto the main whistle, and we have a little lever, three levers on the bridge, and we just throw that lever in and the whistle will blow automatically, the regular fog signals.

Q. What length of time is there between the blasts? A. There is 55 seconds.

Q. Interval? A. Interval.

Q. What is the length of the blasts?

A. About 5 seconds.

Q. Were you in position on board that vessel to know whether or not her whistle was sounding, was blowing as usual, a full tone, prior to your sighting the "Necanicum"? A. Oh, yes.

Q. I will ask you whether or not it is a fact that there was any time on the voyage, or after leaving Point Arena, or before the collision, that your whistle, by the blowing of it, emitted steam, to give forth no sound. A. No, that cannot be.

The COURT.—You say that cannot be. The question is, was it? A. No.

Mr. CAMPBELL.—Q. What, if anything, Captain, would prevent sound being emitted by the whistle as steam was turned into it, as you do turn it into it to blow it?

A. Well, when the steam is turned on to it, the whistle must blow. There is a flapper on the whistle,

(Testimony of E. W. Mason.)

there, that takes all the water, if there is any water in the steam.

Q. Pay attention to my question: My question is, If the whistle was prevented from blowing upon the turning in of the steam, what would prevent the sound coming from the whistle as it ought to?

A. I don't know as anything could prevent it.

Q. If it were prevented, if, in fact, you turned on the steam to blow the whistle, you pulled the cord or your lever so as to let the steam into the whistle, and, in fact, no sound came out [248] of your whistle, what, in your judgment, would be the element or factor which would prevent the sound coming out?

A. There would be water in the whistle.

Q. Now, I ask you, prior to the collision, or at any time on that voyage, whether that whistle was blown and failed to emit any sound by reason of water in the whistle? A. No.

The COURT.—Or for any other reason. Do you simply confine it to the one reason?

Mr. CAMPBELL.—Yes, for the moment.

The COURT.—Are there no other reasons that cause a whistle not to blow?

Mr. CAMPBELL.—Yes.

The COURT.—I didn't know why you were so particular to confine it to the water.

Mr. CAMPBELL.—I am leading up to another fact.

Q. What is there about the whistle, Captain, that would prevent water getting into it so as to stop the emission of any sound?

(Testimony of E. W. Mason.)

A. We have an escape trap on the whistle, that carries off the water, prevents the water from going up into the pipe where the steam goes; the water cannot go up in the pipe where the steam is. This trap carries the water off, if there is any from the steam, so that the steam will go up and blow the whistle.

Q. Now, I ask you whether or not on that voyage, and particularly prior to the collision, that steam was ever turned into that whistle for the purpose of blowing it without that whistle emitting its usual and customary sound? A. No.

Q. As long as you have been master of the "Beaver," have you ever known of that whistle failing to emit its customary and usual sound upon steam being turned into it for that purpose? A. No.

Q. Had you been blowing the whistle during the forenoon of that [249] day? A. Yes.

Q. Under what conditions?

A. Light prevailing fog which settled down and lifted right up—we would probably blow one or two blasts and not blow it for a little while after that.

Q. What was the condition of the atmosphere after you passed Point Arena and up to the time that you saw the "Necanicum"?

A. You could see a distance of four or five miles; offshore, you could see seven or eight miles; you could see the land in along the beach as we went along there.

The COURT.—What time was that?

A. After passing Point Arena.

Mr. CAMPBELL.—Q. From that time up to the time that you sighted the "Necanicum," did the fog

(Testimony of E. W. Mason.)

set in on you? A. Yes.

Q. What was the condition of the atmosphere at the time that you saw the "Necanicum"?

A. We could see fully a mile off all around the horizon.

Q. Who reported the "Necanicum" to you, Captain? A. The lookout-man reported her.

Q. Where was he stationed on the "Beaver"?

A. Right forward on the forecastle-head.

Q. Where is that with respect to the stem of the vessel? A. Right at the stem.

Q. When you saw the "Necanicum" I understand you to say it was simultaneously with her being reported. A. Yes.

Q. Where did she bear to your vessel at that time?

A. Right ahead, sir.

Q. If she were on one bow or the other, which bow would it be on, and at what angle?

Mr. DENMAN.—He said she was right ahead.

A. She appeared to be right ahead, a little, if anything, on the port bow from [250] where I was standing.

Mr. CAMPBELL.—Q. Where were you standing?

A. A little on the starboard side.

Q. Of what? A. Amidships of the mast.

Q. Amidships of the mast?

A. The mast amidships, a little to the right of the starboard of the mast.

Q. On what? A. On the bridge.

Q. I will ask you whether or not it is true that at that time or at any other time when the "Beaver"

(Testimony of E. W. Mason.)

was within the distance of a mile of the "Necanicum" the "Beaver" was three-quarters of a mile to the starboard of the "Necanicum."

A. No. The "Beaver" was three-quarters of a mile.

Q. To the starboard of the "Necanicum"?

A. No.

The COURT.—Your question means, as stated, at any time that you were within a mile of the "Necanicum."

Mr. CAMPBELL.—Yes.

Mr. DENMAN.—You say any time within a mile of the "Necanicum" was she then three-quarters of a mile from the "Necanicum"?

The COURT.—No. That was not it exactly, but if at any time while she was within a mile of the "Necanicum" she was three-quarters of a mile to the starboard.

Mr. CAMPBELL.—I asked that question for the reason that the testimony of the first mate of the "Necanicum" was that when he saw the "Beaver"—

The COURT.—I understand by that you mean on a line three-quarters of a mile to the starboard.

Mr. CAMPBELL.—His testimony was when he saw the "Beaver" she was practically, approximately, three-quarters of a mile ahead and three-quarters of a mile to starboard.

Mr. DENMAN.—I disagree with you as to your interpretation [251] of the testimony.

Mr. CAMPBELL.—That is as accurate as I can state it now.

(Testimony of E. W. Mason.)

Q. What did you do, Captain, from the time that you first sighted the "Necanicum" with respect to the navigation of the "Beaver"? Tell the Court just what happened from that time on.

A. I ordered, or told the second mate to switch off the automatic whistle, and I blew the "Necanicum" one whistle, and I waited for about 30 seconds; at the same time, I ordered my quartermaster at the wheel to port—I waited about 30 seconds, and I did not hear any reply, passing signal, and I blew him another blast of the whistle, shortly after that.

Q. What whistle was that you blew then?

A. One whistle again, not having a reply from the other one; shortly after that, it might have been 30 seconds or thereabouts, why, we heard a whistle—I heard a whistle from the "Necanicum."

Q. What whistle?

A. One whistle; the wheel being to port and the ship starting to swing, she was swinging over to starboard; you see, the "Necanicum," apparently—there is no question about it—had its wheel to the starboard, and she swung on towards us, and I remarked, "I wonder what in the devil that fellow is doing." I told the second officer to put her full speed astern; the second officer put the telegraph full speed astern, and I blew him three blasts on my whistle, telling him that I was going full speed astern, we still swinging on the starboard helm. At that time, he was away over here, about three points on my port bow.

Q. You swung on what helm?

A. The port helm—we had been swinging off to

(Testimony of E. W. Mason.)

starboard, while he was swinging off, making a pretty good swing there, swinging around.

Q. Which way was he swinging?

A. He was swinging on apparently [252] a starboard helm; as he was swinging on toward us all the time. If he put his wheel the other way, or even continued his course, there would not have been, in my opinion, no collision.

Q. I am not asking you for your opinion. I am asking you what was done with respect to your vessel and your movements.

A. We backed the ship full speed astern and blew three whistles. The ship backed for along about two minutes, and the "Necanicum" threshed into us on our port bow, about 12 feet from the stem.

Q. At about what angle did they come together?

A. About 45 degrees, about a right angle.

Q. Is 45 degrees a right angle?

A. Practically—in along about 40 degrees.

Q. When you blew your first one whistle, passing signal to the "Necanicum," from the time that you blew your first one whistle, passing signal to the "Necanicum," was she in sight? A. Yes.

Q. Up to the time of the collision? A. Yes.

Q. Did you see any steam emitting from her whistle? A. No.

Q. Prior to the time that you heard one blast of his whistle in answer to the second one blast of your whistle? A. No.

Q. How far off did you judge the "Necanicum" to be at the time you first sighted her?

(Testimony of E. W. Mason.)

A. Fully a mile.

Q. When did you detect or observe the "Necanicum" swinging towards your vessel as though it were under a starboard helm?

A. We were about half a mile apart then.

Q. At the time of the collision, what is your judgment as to the speed of your vessel?

A. We were not making two miles an hour; we had practically stopped.

Q. When the vessels came together, what did the "Necanicum" do, what became of her?

A. Apparently she backed off and swung around so we could not see her whole starboard side; then she [253] backed away into the fog, and then the fog shut down thick; we could see her for fully two or three minutes after that.

Q. Did you hear any whistles from that time on?

A. We heard one whistle, that was all.

Q. What was it?

A. Just the one blast, apparently a fog-signal, a long blast.

Q. Now, before the vessels came together, Captain, were you in a position to observe whether or not there was anyone on the "Necanicum's" bridge?

A. Yes.

Q. Did you see anyone on the "Necanicum's" bridge? A. Yes.

Q. What did you see?

A. No, not previous to the collision.

Q. When did you see anyone on the "Necanicum's" bridge? A. After the collision.

Q. Describe what you saw, or whom you saw.

(Testimony of E. W. Mason.)

A. After the collision, a man came out on the end of the bridge on the starboard side, and he was in his shirt sleeves—he either was in his shirt sleeves or the sleeves were rolled up above his wrists, and the front of the shirt was all open, and he had no hat on, and he sung out something about “Why didn’t you blow your whistle”; that is all I heard him say; that is all I seen of him.

Q. Did you ever at any time see any other person on the “Necanicum’s” bridge than the man you have described? A. No.

Q. Did you see anyone on the forecastle head in the position of a lookout? A. No.

Q. On the “Necanicum”? A. No.

Q. At any time prior to the collision? A. No.

Q. Did you after the collision? A. No.

Q. Could you see the damage that was done to the “Necanicum” as the vessels separated?

A. Oh, yes.

Q. What did the damage at that time appear to you to be? [254]

A. Just the stem was splintered for—not down to the water line—just splintered over a little to one side.

Q. What type of vessel was the “Necanicum”?

A. A wooden vessel.

Q. What type of a vessel?

A. Steam schooner, lumber carrier.

Q. Where was her machinery? A. Aft.

Q. Was she light, or loaded? A. She was light.

Q. How was her bow with respect to her stern, on the level?

(Testimony of E. W. Mason.)

A. No, her bow was up higher than her stern was.

Q. With a vessel trimmed as the "Necanicum" was at that time, would she draw more water aft than forward, or *vice versa*?

A. She would draw more water aft; she had no freight in—I don't know what she had in—she looked pretty high out of the water forward.

Q. Captain, I want you to just make a drawing here indicating the approximate movements of the two vessels as you have described them, from the time that you first blew your passing whistle to the "Necanicum." Will you take that sheet of paper and take these two models and assume that the larger one of the two is the "Beaver" and the smaller one is the "Necanicum." I am not asking you to do it to scale; I am asking you to show the approximate direction and movements of the two vessels.

A. There they are.

Q. Have I correctly marked on that where you have laid down the "Beaver" and the "Necanicum"?

A. Yes.

Q. I understand those positions marked "1" and "1" are the positions of the two vessels at the time that you saw the "Necanicum"? A. Yes.

Q. She was then approximately—

A. A good mile off.

Q. Directly ahead? A. Yes.

Q. Which way did your vessel from that time on swing? [255] A. Swung toward the starboard.

Q. Under a port helm?

A. Under a port helm, yes.

(Testimony of E. W. Mason.)

Q. Take the two models now and place them so as to show the angle of impact between the two vessels.

A. When they came together?

Q. Yes, to show the angle of impact.

A. About like that (illustrating).

Mr. DENMAN.—Just leave them as they are. I want them drawn as he has put them there.

Mr. CAMPBELL.—The absurdity of that of course is manifest on its face.

Mr. DENMAN.—I don't think it is.

The WITNESS.—He came in around here.

Mr. DENMAN.—Don't touch that, Captain. I want that left there so that we can draw it in.

Mr. CAMPBELL.—As near as you can, show the course of the two vessels up to the time that they came into collision, so as to show the angle of impact.

Mr. DENMAN.—One moment, Captain. Don't move them.

Mr. CAMPBELL.—Let me suggest that you take the two models and lay them where you say they were before the captain moved them, Mr. Denman. The Court did not see that.

Mr. DENMAN.—Q. Is this the position they were in when you placed them there? As I understand, that is the position the captain put them in.

A. I shifted that a little since then. [256]

Q. You have not shifted this one since then?

A. I moved it out a little bit.

Mr. CAMPBELL.—What I am after, if your Honor please is, I want the Captain to show the courses through which the two vessels went up to the time of the impact and the angle of impact. I am not

(Testimony of E. W. Mason.)

expecting it to be drawn to scale. We would have to go at it quite differently if we did.

Mr. DENMAN.—Just kindly draw them in as they were when you placed them before.

Mr. CAMPBELL.—Is my question to be answered or Mr. Denman's?

Mr. DENMAN.—Here is a witness put on to do certain things, and he answers the question by doing certain things and not satisfying my opponent, he says no, that is manifestly an absurdity, and wants him to do something else. If the chart is to be used at all in this way each move ought to be recorded.

Mr. CAMPBELL.—Mr. Denman, I think Judge Dooling was sitting there and did not see what took place. The captain put these models down here showing an angle of impact at a position that you must confess yourself could not have possibly been the position reached by the vessels passing through any course. Now it may be that you would like to have that put on the chart. Put it on yourself where they were before. What I am asking the witness now is to draw the course through which the vessels went as approximately as he can and showing the angle of impact. I think that the question is a fair question.

The COURT.—Is that where the witness placed the models in answer to your first question?

Mr. CAMPBELL.—No. I will show the Court where I think the models were placed. I think the models were placed like [257] that.

Mr. DENMAN.—They were not touching.

(Testimony of E. W. Mason.)

Mr. CAMPBELL.—You show the position where they were.

Mr. DENMAN.—That won't get us anywhere. My impression is that they were further apart.

Mr. CAMPBELL.—Show the Court where you think they were.

Mr. DENMAN.—Like that (illustrating).

The COURT.—Q. Where do you think they were placed, Captain?

A. I didn't pay much attention. I put the vessels together. As I understood Mr. Campbell to say, he wanted to know how the "Necanicum" ran into the "Beaver"; that is what I understood Mr. Campbell to ask; I did not understand Mr. Campbell asked to show the route they took.

The COURT.—Q. Show the angle of impact first.

A. A little more than this—that was the line that the ship came into that ship.

Mr. CAMPBELL.—Q. You have laid them down now in answer to the Court's question? A. Yes.

Q. Showing the angle of impact?

A. Yes, with this vessel.

Q. Let me draw them in that way. The ones that I have marked *b* prime and *n* prime. Mr. Denman, so as to be absolutely fair with you I am willing that you should lay the models on the chart as you think the Captain did in the first place and we will draw them in then.

Mr. CAMPBELL.—That won't get us anywhere. Let the Captain go on with his testimony.

Mr. CAMPBELL.—Q. Now, the question that I

(Testimony of E. W. Mason.)

asked you, at least that I want to ask you now is to take these two models and starting from the positions that you have marked 1, which you have said are the positions of the two vessels when you [258] first saw the "Necanicum," show me the approximate courses through which the two vessels passed up to and including the angle of impact?

A. Well, we seen that vessel this way; he was right square ahead, and I blew one blast of my whistle, and we ran along here, and the ship started to fall off this way, and I says to myself, what is the matter with that fellow, he is not answering the whistle, and I blew him another whistle about 30 seconds after; in the meanwhile we were pretty nearly all the time like this; the ship was swinging on the port helm; then he blew a whistle, he answered that whistle, or he blew a whistle anyway, and we continued to go along here, and the first thing I saw this fellow swinging this way, and I says what in the devil is he doing now, and I told the second officer to put her full speed astern.

Mr. DENMAN.—Q. When you say "swinging this way" mark that.

A. He had come ahead—this thing here must be over at that angle, more that way.

Mr. CAMPBELL.—Q. Mark that position so that there will be no question about it.

A. You see his head was swinging in toward us.

Mr. DENMAN.—Q. You first saw him in the position marked "Nec" 2: is that right?

A. Yes, with his head swinging this way all the time, swinging in toward us.

(Testimony of E. W. Mason.)

Mr. CAMPBELL.—Q. When you say “this way,” the Reporter can’t get that down—was it to port or starboard?

A. Swinging to port; his head was going toward port, was coming toward us all the time; and seeing that he was swinging in toward us we were playing off here at this angle.

Q. You continued to shove your vessel ahead as she was moving?

A. As we were moving here, we were probably about at that [259] angle; I stated to the second officer “put her full speed astern”; he threw the telegraph over, and I blew my three whistles; we started backing; as we started backing away we naturally swung a little more, as we would apparently; this fellow started to come along here.

Q. Wait a minute.

A. The ships then were about a quarter of a mile apart, at that angle; it might have been down this way a little bit.

Mr. CAMPBELL.—Mark it, Mr. Denman.

Mr. DENMAN.—Q. As I understand Captain, “Nec 3” is your impression of the relative position of the “Necanicum” to her first position to you when they were a quarter of a mile apart? A. Yes.

The COURT.—The second position, is that marked?

Mr. DENMAN.—Not the position of the Beaver.” At that time the “Beaver” seemed to be in the position B 2?

A. Yes.

(Testimony of E. W. Mason.)

Mr. CAMPBELL.—Q. What happened from that time, Captain?

A. Then we were backing, which naturally held our way, and we swung a little more, and he was more over in this position, as we could see all this side of him, his whole starboard side; we may have got a little more angle to ourselves.

Q. Place them where they came together?

A. There is where they came together.

Mr. CAMPBELL.—Will you mark those, Mr. Denman, too please.

Mr. DENMAN.—Q. That is right, isn't it?

A. Yes.

Q. I am now marking N 4 and B 3, as being the last position described by the witness, at the moment of impact. A. Yes.

Q. Those represent the successive positions with reference to one another?

A. Yes, as near as I can judge.

Mr. CAMPBELL.—You can cross-examine him later; let me finish my direct examination. I offer this in evidence.

(The chart is marked "Libelant's Exhibit 3.")

Q. What speed, Captain, was your vessel running at from Point Arena up to the time that you first observed—or at the time you reversed your engine on seeing the "Necanicum," which as I understand it, was the first change of speed you made?

A. We were making 14.7 knots.

The COURT.—Was that your usual speed, Captain? [260]

(Testimony of E. W. Mason.)

A. We have made 16, your Honor; yes, we have made 16 $\frac{3}{4}$. That is our economical speed.

Q. What I really meant was you had not slowed down because of the fog? A. No, sir.

Mr. CAMPBELL.—Q. Who was on board with you at the time of the collision?

A. The second officer, Mr. Ettershank.

Q. Do you know whether or not the chief officer came on board before the collision? A. Yes, sir.

Q. Did he remain there?

A. Oh, just a few seconds.

Q. What was his name? A. Mr. Parker.

Q. (By the COURT.) What time did he come on?

A. He came on when he heard the three whistles and the backing of the engines; the ship backs very strong, she vibrates, she backs quick.

Mr. CAMPBELL.—Q. I ask you what your judgment is as to whether or not the “Necanicum” had headway at the time of the collision?

A. Yes, sir; she had headway.

Q. Did you ever receive three whistles or hear three whistles blown by the “Necanicum”?

A. No, sir.

Q. Did you ever see any steam emitted from her whistle indicating that she was blowing three whistles? A. No, sir.

Mr. CAMPBELL.—That is all of the direct examination, if the Court please.

Cross-examination.

Mr. DENMAN.—Q. Captain, you had a number of passengers on your ship at this time, did you?

(Testimony of E. W. Mason.)

A. Yes, sir.

Q. How many? A. Over 480.

Q. How severe a jolt did you get in the collision?

A. We felt it; that is, she hit and bounced off like.

Q. You hit and bounced off like?

A. No, no, the "Necanicum" hit us and bounced back.

Q. You will state then that the "Necanicum" bounced back from you? [261]

A. Yes; either—yes.

Q. You felt the jar, did you? A. Yes, sir.

Q. How far did the "Necanicum" enter into your skin? A. Oh, I would say 4 feet; not over 4 feet.

Q. That was quite a cut, was it not?

A. Yes, sir. It was all above the water-line. We have an overhanging bow and that is why.

Q. Did it twist your bow any, the stem?

A. No, sir.

Q. Did it do any damage below the water-line?

A. No, sir. There was one plate there cracked a little, I believe; that was all.

Q. Did you make any water below the water-line?

A. Sir?

Q. I say did you make any water? A. No, sir.

Q. You swear to that?

A. Yes. Our fore-peak tank was full of water.

Q. Did you lose any water from the fore-peak tank? Was there any injury to your hull at all below the water-line?

A. A couple of plates were wrinkled up; I believe one plate was slightly cracked below the water-line.

(Testimony of E. W. Mason.)

Q. You saw the "Beaver" after she was in the dock, did you not? A. Yes, sir.

Q. I ask you whether or not this is a photograph taken of her bow at that time? A. Yes, sir.

Q. What has happened to the lower part of the stem there?

A. This particular stem here?

Q. Yes. A. That is cracked right in there.

Q. That is below the water-line, is it not?

A. Yes, sir.

Q. Then she was cracked below the water-line?

A. Her stem, yes, sir.

Q. What is that twist on the bottom of the stem?

A. She set over there a little; where she hit on the port side [262] the frames naturally bulged down on the other side.

Q. So she had a blow on the side that sent her over below the water-line on the starboard side at about the point where the water is pouring out of the vessel in the picture?

A. The frames on the offshore side were bent, yes, sir, I believe there were four cracked—the frames rather.

Q. She received a blow then that twisted her over below the water-line so that she was twisted at the point where the water is seen in this picture running out from the bottom of the vessel. That is correct, is it not?

A. Yes; there is a little hole there; yes, sir.

Q. But she had received a blow on the other side which had twisted the frames and made that injury?

(Testimony of E. W. Mason.)

A. The reverse-bars, yes.

Q. And that must have been below the water-line, must it not, to have made that?

A. Not necessarily to be hit there.

Q. So you could not tell, could you? A. No, sir.

Q. Any blow on a ship—on the stem—in the neighborhood of the water-line might make that injury below; that is correct, is it not? A. It might; yes, sir.

Q. And you cannot tell merely from looking at it how much damage you had—from the outside?

A. No, you would have to have a general survey.

Mr. DENMAN.—I offer this in evidence as Claimant's Exhibit "A."

Mr. CAMPBELL.—Q. How much above the water-line was this injury that you saw on the "Necanicum"? You testified it went about halfway down below the bow? A. Oh, about 20 feet.

Q. How far from the water-line was the injury on the "Necanicum's" bow?

A. You mean from the water-line down? [263]

Q. From the water-line above? You testified you looked at the "Necanicum's" bow, that she had simply been scratched and that the injury did not go down to her water-line; how much above the water-line did the injury extend?

A. About halfway.

Q. In other words, the "Necanicum" had received no injury from the water-line to say 10 feet up—is that correct? A. Yes, so far as I could see.

Q. You could see her bow, could you not?

A. Yes, sir.

(Testimony of E. W. Mason.)

Q. And you are sure of that, are you?

A. I am sure of what I could see.

Q. You are sure you saw her bow and she had no injury for about 10 feet above the water-line?

A. Yes, sir.

Q. You swear to that?

A. From what I could see, yes, sir.

Q. Well, you could see, could you not?

A. Yes, sir.

Q. You could see it well enough to swear to it on Mr. Campbell's examination, could you not?

A. Well, yes.

Q. Of course, having all these passengers on board you had a good deal to think about, did you not?

A. Yes, sir.

Q. What was the first thing you did after the collision?

A. The first thing I did after the collision was to come ahead on the engines and straighten the ship up on her course.

Q. How soon after the collision did you give the order to come ahead on the engines?

A. Oh, a moment after.

Q. A moment after; at that time what was your direction from the "Necanicum"?

A. The "Necanicum" was about abreast of us.

Q. About abreast of you?

A. Yes, and practically on the same angle that we were on.

Q. In other words, when the two vessels struck,

(Testimony of E. W. Mason.)

you say they struck at an angle of about 45 degrees?

A. Along about there; yes, sir. [264]

Q. After they had struck, the "Necanicum" turned around so that she was about parallel to you and pointing in the same direction?

A. Practically, yes, but wider off.

Q. How soon after they struck was she in that position?

A. A couple of moments, about 30 seconds.

Q. Within 30 seconds?

A. Yes, sir, because we watched her as she backed away and got the whole port side view of her.

Q. And your assertion is that as she backed away she turned to her port and exposed to you more and more of her starboard side?

A. Oh, yes, we seen the whole of her starboard side.

Q. And she kept continually showing more and more until she backed away? A. Until the fog—

Q. (Intg.) Until she was about parallel to you—that is correct, is it? A. Yes, sir.

Q. And all of that time she was backing?

A. I would say so; I don't know; I didn't pay any attention to that.

Q. But your impression is she was backing?

A. Yes, sir.

Q. What gave you that impression, Captain?

A. The ship was going astern from us, going away from us.

Q. Have you ever been on the "Necanicum"?

A. No, sir.

(Testimony of E. W. Mason.)

Q. About what direction was your vessel headed after the collision?

A. Well, I did not note the compass. I took the ship and put her right back on the course.

The COURT.—Q. Do I understand the effect of your testimony to be, Captain, that within 30 seconds after the collision the “Necanicum” was headed in the same direction as yourself and parallel with you?

A. Yes, sir, practically abreast of us.

Q. Abreast? A. Yes.

Mr. DENMAN.—Q. And you were going ahead at full speed on your engines immediately after the collision, as I understand you—at once? [265]

A. That was just to straighten her up, only for a few seconds.

Q. Don’t you know, as a matter of fact, that you ran for a minute after you straightened her up full speed ahead?

A. It might have been along about a minute. I don’t recall just the time, but it was within that time anyway, just to get the ship straightened up on her course again and get her on her right angle.

Q. The “Necanicum” during that time was backing? A. Yes, sir.

Q. And despite that fact the two of you ran along parallel so that at the end of a couple of minutes you were parallel with one another but she was off at a distance?

Mr. CAMPBELL.—The witness did not testify to that, he did not say a couple of minutes.

The COURT.—He said 30 seconds.

(Testimony of E. W. Mason.)

Mr. DENMAN.—He said that within 2 minutes she disappeared in the fog.

A. We were not making headway in that minute, we were not making any headway; it was just to straighten the ship up.

Q. You are sure you were not making any headway? A. Oh, yes, I am positive.

Q. That being the case, Captain, what further efforts did you make to discover whether or not the “Necanicum” needed your assistance?

A. The chief officer reported and the carpenter reported the ship was not making any water and that the damage was all done above the water-line.

Q. On your ship? A. Yes, sir.

Q. So you went right ahead? A. Yes, sir.

Q. The first bell was full speed ahead, was it, after the collision? A. Yes, to straighten her up.

Q. That was almost immediately after the collision? A. Yes, sir. [266]

Q. You were then thinking at once of taking your course and going on?

A. No, sir, I was not; I was thinking of putting the ship on her straight course. There were other vessels liable to come along, you know; we didn't want to lay broadside on on the ocean there and have other vessels coming along.

Q. How soon did you get your course in straightening her up? A. Oh, about a minute.

Q. About a minute? A. Yes, sir.

Q. What did you do then?

A. When the chief officer reported that the ship

(Testimony of E. W. Mason.)

was making no water I put her on her course and proceeded to San Francisco.

Q. What attempt did you make to find out what had happened to the "Necanicum" after that?

A. From what we could see there was nothing the matter with her.

Q. Did you inquire?

A. No, but from observations I was sure there was no damage to her.

Q. I thought you just said, Captain, you could not tell when you had a blow on the stem like that that she had not been twisted below the water-line?

A. Are you speaking about the "Beaver"?

Q. I am speaking about any vessel.

A. I was anxious to get the "Beaver" into port, knowing she had damage and with 480 passengers aboard of her. I was pretty anxious to get my ship into port with all those people.

Q. I thought you said the chief officer reported there was no damage?

A. The chief officer reported there was no damage done above the water-line and the carpenter reported the ship was making no water.

Q. Is there any rule that requires you to stand by another vessel you have been in collision with?

A. Yes, sir. [267]

Q. What is that rule?

A. To stand by and ask if they require any help.

Q. You admit you did not do that in this case, don't you? A. Yes.

(Testimony of E. W. Mason.)

Mr. CAMPBELL.—One moment. If the Court please, we object to that line of examination on the ground that it does not bear on the merits of the collision case. It may bear on the question of whether he is entitled to his license, or not, but it does not bear on the merits of the collision case.

The COURT.—We will have to suspend for a few minutes now because we have a jury coming in. (After a short recess.) I believe we left off at the point where you were asking the witness whether the ship stood by after the collision.

Mr. CAMPBELL.—And I objected to that line of testimony.

Mr. DENMAN.—I understand the rule to be, if your Honor please, that there is a burden thrown on a ship that fails to stand by, and that it places on her the additional burden of showing that she was not responsible for the collision. I will present the authorities to your Honor later on. As a matter of fact, I want to show weather conditions and other things—speed, and the location of the vessel by what happened afterwards and by what happened before. I am going quite fully into it.

Mr. CAMPBELL.—If he is going into it for one reason, that is one thing; if he is going into it for another reason, that is another thing. I simply want the record to show my exception. I am not familiar with any such rule.

The COURT.—I am not familiar with it either, but that does not imply that there is no such a rule.

(Testimony of E. W. Mason.)

Mr. CAMPBELL.—Of course, there is a statute of the United [268] States that makes it obligatory—

The COURT.—I understand there is a rule which requires a ship to stand by. What I had in mind though was would such a rule throw any light on the antecedent collision.

Mr. CAMPBELL.—Yes, that is my point.

Mr. DENMAN.—There is a provision of the rule to the effect that if the rule is broken then there is a presumption, and the burden of proof is on the party breaking the rule to show that the collision did not arise through his acts. I thought that that was familiar to all of the admiralty bar. I guess for the first time I have one on my friend Campbell.

The COURT.—Well, we will take the testimony and discuss the effect of it later; and that will be subject to your exception.

Mr. CAMPBELL.—Yes, your Honor.

Mr. DENMAN.—Q. What time did you leave your last port?

A. 6 o'clock in the morning, on the 29th.

Q. On the 29th? A. Yes, sir.

Q. 6 o'clock exactly?

A. Or thereabouts. 6 o'clock in the morning. I don't just remember exactly. It is a year ago.

Q. What was the last port? A. Astoria.

Q. And then you sailed down the coast on this voyage? A. Yes, sir.

Q. What weather did you have the day before the collision?

(Testimony of E. W. Mason.)

A. We had a light northwest wind, I believe. I don't just recall it, but I believe we had northwest weather.

Q. Any fog? A. No, sir.

Q. How was it on the morning of the collision, how about the fog then?

A. Oh, it was clear. We made the light-ship. We seen the land anywhere. It was pretty clear. You could always see 4 or 5 miles. [269]

Q. What revolutions were you making that morning as you came down the coast?

A. She was making 78½.

Q. Was that about your average rate of running there?

A. She got a little lower than that, about 77 or 77½.

Q. Was it a fraction above 77?

A. Well, it was in about that.

Q. How did she come to change from one to the other? A. Current conditions apparently.

Q. Current conditions?

A. Yes, sir. There might be a little wind, or a little choppy sea, or something of that sort.

Q. There was not any change in the amount of power put on the engines, but some change due to the condition of the current; is that it?

A. Yes, sir.

Q. You did not make any orders for any change in the number of revolutions at any time on that day, did you? A. No, sir.

Q. Who kept the bridge log-book?

(Testimony of E. W. Mason.)

A. There are three navigating officers and each officer keeps his own watch. We have three navigating officers on the ship.

Q. Who kept the log that afternoon—Ettershank?

A. That is, you mean from 12 o'clock?

Q. Yes. A. Yes, sir.

Q. Would you say that at this season of the year there is a likelihood of an inset current on that coast?

A. Yes, sir.

Q. From San Francisco north? A. Yes, sir.

Q. That often sets you in on Point Reyes and Point Arena, does it not? A. Yes, sir.

Q. And you often find that you bring up on both points a little closer than you expected on account of that current, do you not? A. Yes, sir.

Q. What would your vessel make, or do you know exactly how many knots your vessel will make at 76 revolutions? [270]

Mr. CAMPBELL.—If the Court please, I cannot see the materiality of that. We admit a speed of 14.7 knots per hour. The witness has testified that that was the full running speed of the vessel, or her average running speed.

Mr. DENMAN.—That is what I am cross-examining him on.

Mr. CAMPBELL.—I believe he said the log stated 78 revolutions. I cannot see the materiality of the inquiry into what the speed would be at 76 revolutions, which was a lower speed than we admit we were going at.

(Testimony of E. W. Mason.)

The COURT.—That may be true, Mr. Campbell, but it does not appear so from the question.

Mr. CAMPBELL.—But does it not follow as a physical fact that if a wheel turns 78 revolutions she will give a faster speed than one driving at 76?

Mr. DENMAN.—Go right ahead and tell the witness all about it, Mr. Campbell. I am cross-examining him and you are now telling him what my theory is.

The COURT.—The trouble is you are assuming that the libellee is bound by the testimony that the vessel was going 14 knots.

Mr. CAMPBELL.—That is our admission.

The COURT.—Maybe counsel wants to show she was going faster than that. The witness said the vessel could go 16 knots.

Mr. CAMPBELL.—But he was asking him about 76 revolutions, which is a less number of revolutions than he answered she was going.

The COURT.—Let us assume that the witness would answer that at 76 revolutions the vessel would go 15 knots per hour; how can you determine from the question what the answer is [271] going to be? You may know what the answer is going to be; the Court however cannot determine it from the question. It is only when a question is palpably improper that the Court can shut off the answer.

Mr. CAMPBELL.—And I think Mr. Denman imputes to me a motive that is not present. I am not instructing the witness; I do not pretend to have the knowledge to instruct the witness.

(Testimony of E. W. Mason.)

Mr. DENMAN.—Mr. Campbell has stated one theory; I am going up and down that theory and cross-examine to my heart's content to find out if the witness is correct.

The COURT.—If we take it as an absolute fact that 78 revolutions will produce 14.7 knots per hour it would of course follow as night does day that 76 would be less than that. But that has not appeared up to the present time.

Mr. DENMAN.—I want to show that 76 revolutions will give a speed of over 15 knots.

The COURT.—The objection will be overruled.

Mr. DENMAN.—Q. What is your average running time down the coast?

The COURT.—Well, what have we done with the question that all this discussion is about?

Mr. DENMAN.—I didn't like to have the answer come right on top of the suggestion that has been made, if your Honor please. I will withdraw the question.

A. When do you mean, at what time do you mean?

Q. In fair weather.

A. We have come down in 36 hours from Astoria.

Q. 36 hours from Astoria? A. Yes.

Q. And how far is that? A. 547 plus 15.

Q. What is your average rate of speed down the coast? A. About 15. [272]

Q. About 15 knots? A. Yes, sir.

Q. That includes entering and leaving port, does it not? A. Yes, sir.

Q. So you go faster at sea than 15 because you

(Testimony of E. W. Mason.)

have to go slow in leaving port and in entering port, do you not?

A. Oh, no. If we have the tide favorable we go faster.

Q. You go faster up to the dock?

A. We take our departure from the time we get up to Meiggs' Wharf; that is where we slow down and where we start.

Q. But your running time is from dock to dock, is it not? A. No, sir.

Q. What is it from, from the point where you leave one dock until you come to Meiggs' Wharf?

A. Yes, sir.

Q. You do go slow in leaving your dock at Astoria, do you not? A. Not always.

Q. Do you go at full speed leaving that dock?

A. Yes, sir.

Q. You start right off at full speed?

A. I do; yes, sir.

Q. What is that? A. I do.

Q. I mean is that the practice with your ship?

A. It depends upon the tide.

Q. With the vessel starting—with the vessel at rest in the water and you start out, you go at full speed, do you?

A. Just swing the bow off a little; we can shoot right out at full speed ahead, yes, sir, when we get the ship lined up.

Q. Do you know how fast your vessel will run under 76 revolutions?

A. We figure about 14 miles an hour. It all de-

(Testimony of E. W. Mason.)

pend upon the slip. She has made only 8 miles an hour on 76. She has never made over 14. 76 is her average.

Q. This day was a calm day, was it?

A. Yes, sir.

Q. Which way was the wind blowing?

A. A light southerly wind. [273]

Q. I say which way was it blowing?

A. Against us.

Q. Which way was the current setting, if you know? A. To northward.

Q. Would that make any difference in the rate at which you went through the water? A. Yes, sir.

Q. How does the current, if you are running in it, make any difference in the rate you would run through the water? I am not talking about between the land but I am talking about over the water?

A. We would run against the current.

Q. How would that affect your rate in the current?

A. The log would show what current there was, if any.

Q. What time did you arrive in San Francisco?

A. I do not know the exact time; it was in the neighborhood of 8 o'clock.

Q. What is the effect of running into the current, on your log, with reference to showing an over run or an under run of the log?

A. If the log under runs it shows we have the current with us; if it over runs we have the current against us.

Q. Do you know whether the log showed one thing

(Testimony of E. W. Mason.)

or the other on that day?

A. I don't just recall; no, sir.

The COURT.—Q. State that again about the log. I didn't quite understand the effect of that.

A. If the log under runs the current is with the ship; if it over runs it is against it.

Mr. DENMAN.—Q. How far is it from Point Gorda to Point Arena?

A. That would be $12\frac{1}{2}$ miles off 97.

Q. $84\frac{1}{2}$ miles? A. Yes, sir.

The COURT.—We will put this matter over now until 10 o'clock to-morrow morning. I have another matter to take up.

(The further hearing of this cause was thereupon continued until to-morrow, Friday, October 16, 1914, at 10 A. M.) [274]

[Endorsed]: Filed Jul. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [275]

*In the District Court of the United States for
the Northern District of California, Second
Division.*

Before Hon. MAURICE T. DOOLING, Judge.

Vol. II.

No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

Libelant,

vs.

The Steam Schooner "NECANICUM," Her Tackle,
Apparel, etc.,

Claimant.

No. 15,675.

LEGGETT STEAMSHIP COMPANY (a Corpo-
ration),

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

Claimant.

Friday, October 16, 1914.

APPEARANCES:

For San Francisco & Portland Steamship Co.: IRA CAMPBELL, Esq.

For Leggett & Company: WILLIAM DENMAN, Esq.

Testimony of E. W. Mason, for Libelant (Cross-examination—Resumed).

E. W. MASON, cross-examination, resumed.

Mr. DENMAN.—Q. We were discussing yesterday the question of the speed that your vessel pursued down the coast, and you testified that you did not think that the fact that you had to go slow in and out of harbors made any difference on your speed at sea—that you did not think the fact that you went slow in the harbors would make you go quicker outside, because you got up speed so rapidly when you started from the dock; that is correct, [276] isn't it?

A. I don't understand you. I recall saying if you go out of a harbor and you have an ebb tide, you go out very fast, and if you have got a flood tide, going against it, you are not going so fast; it depends upon the condition of the tide, going in and out of a harbor.

Q. Suppose the tide were slack now? A. Yes.

Q. No doubt at all there would be the same conditions in the harbor as you have at sea?

A. Providing there was no current outside; yes.

Q. Well, the current of one day about makes up for the current of another day on the coast, does it not?

A. No. Throughout the summer months we have

(Testimony of E. W. Mason.)

the current setting in from the northward, on account of the prevailing north winds, which we have about seven months in the year; then the other five months, the current sets to the northward on account of the southeast winds.

Q. Southeast to the northerly? A. Yes.

Q. So that if over a measured course coming southerly in those five months you covered a certain distance between headland and headland, you would really cover more distance, because you have been coming through the water against the current?

A. Yes, sir, if there is a current.

Q. You think that there was such a current against you on the day that you came down the coast and struck the "Necanicum"? A. No.

Mr. CAMPBELL.—I submit that the witness has not testified to that.

Mr. DENMAN.—He said there was a northerly current. That is correct, isn't it? A. No.

Q. You said that yesterday.

A. I said it could be expected, to have a northerly current set in to the northward with a southerly wind. [277]

Q. That is during the five months in which you have this northerly current? A. Yes.

Q. You expected to find such a current on that day, didn't you? A. Yes, some current.

Q. You expected to find a northerly current, didn't you? A. Yes.

Q. Now, you also found on that day there was an in-set current, didn't you? A. Yes.

(Testimony of E. W. Mason.)

Q. When did you first discover that there had been an in-set current on that day?

A. When I sighted Point Arena.

Q. What had been your previous observation so that you could tell it had been setting in?

A. At Greenwood City.

Q. How far was that? A. Nine miles.

Q. How much had you set in during that time?

A. About maybe half a mile to a mile.

Q. Half a mile to a mile in nine miles. That is about right, is it?

A. No. After we passed Point Gorda, at the Greenwood City side, from the view of the land you could see she had cut in from her course.

Q. Did you attempt to go out then? A. No.

Q. You cut in. How much had you cut in by the time you reached Point Arena? A. About a mile.

Q. Cut in a mile by the time you reached Point Arena? A. Yes.

Q. So you think it made a difference of half a mile between those two points?

A. I could not say where the set came; nevertheless, when we were abreast of Point Arena, we were closer in than we had been on previous voyages.

Q. You think about a mile? A. Yes.

Q. Greenwood City, you say, is about nine miles before that? A. Yes.

Q. Had it set in about half a mile at that point?

A. It might [278] have been a quarter, in along about there.

Q. So there was considerable in-set between Green-

(Testimony of E. W. Mason.)

wood City and Point Arena. That is your testimony?

A. No. I can't say that it came all right between there, but in the entire course from Point Gorda down, or Cape Mendocino, Blunts Reef Lightship to Point Arena, she had set in.

Q. Let me get it: You just said you noticed after you left Greenwood City abreast, that you had set in still more when you got to Point Arena. I want to know how much it was.

A. I did not take any observation, I could not say.

Q. Was it enough to notice it?

A. She might have not set in from Greenwood City to Point Arena. As I said, she was a little closer at Greenwood City than she formerly had been—she was closer to Point Arena.

Q. You aimed to pass what distance off—what distance off did you aim to pass Point Arena?

A. From three to four miles off.

Q. From three to four miles off? A. Yes.

Q. As a matter of fact, the usual course is four miles out, isn't it?

A. No, three miles; she has been making three miles right along.

Q. I am talking about coming down, not going up.

A. Three miles.

Q. What is it going up?

A. Sometimes four—anywhere from three to five.

Q. Don't you sail more to your starboard on one course than on the other? A. No.

Q. Isn't that the usual custom on this coast?

(Testimony of E. W. Mason.)

A. No. Some people pass the point a mile off and sometimes they pass it ten miles off.

Q. On which course? A. Either way.

Q. Don't you know of a regular practice here of keeping further [279] out to sea on the down course than on the upper course? A. No.

Q. Now, you had set in a mile over 20 miles of run?

A. 97 miles.

Q. 97 miles? A. Yes.

Q. What point did you observe between Point Gorda and Greenwood City? A. None.

Q. Could not see any? A. No.

Q. On account of the fog?

A. There is not any to be seen along there.

Q. All fog?

A. There is not any place to be seen in there. The course is pretty wide in there; she is anywhere from 9 to 15 miles offshore.

Q. 9 to 15 miles offshore?

A. The land sets in around there.

Q. The first thing you saw was Greenwood City, then?

A. The first thing. We have seen the land along there; we would not take any notice of it if we had any land coming along there.

Q. The first thing you noticed in the way was Greenwood City? A. Yes.

Q. You could not tell whether that in-set had come the first part or last part or coming along the 97 miles you came down? A. No.

Q. It might have piled on the last moment, and

(Testimony of E. W. Mason.)

might have been distributed all along, or in the beginning?

A. She was a little closer to Greenwood City than usual; there was some little in-set there; it showed up a little closer than it did before.

Q. You think by the time you reached Point Arena it was still more in-set? A. I could not say.

Q. Then you don't know where the in-set had come? A. No.

Q. Except some of it may have occurred before Greenwood? A. Yes.

Q. Captain, going back to the question of coming in and going out of port. As I understand it, you say if the conditions in the [280] harbor were the same as at sea you would start full speed ahead the minute you got clear of the dock, and would have about the same speed in the harbor that you would out on the ocean?

A. Yes, if conditions were the same in the harbor as at sea.

Q. It would take you about a minute to get full speed?

A. Yes. She has to be warmed up. As a rule, she is warmed up before leaving the dock. But she don't gather headway right at the instant.

Q. It would be a minute before she was under full speed? A. Along about there; yes.

Q. You observe that in the harbor coming out after passing Meiggs' Wharf?

A. No, we do not pay any attention to that; we put the ship full speed, and she comes along.

(Testimony of E. W. Mason.)

Q. You can tell, then, by experience from observing the water alongside moving when you have your full speed? A. Yes.

Q. You think that is about a minute?

A. Along about there.

Q. Now, how was your vessel laden on that day?
What did she draw fore and aft?

A. I don't just recall; she was loaded, though.

Q. Was she of the customary draft? A. Yes.

Q. What is the customary draft, about?

A. About 18-26; 18 feet forward and 26 feet aft.

Q. That puts her in good steering condition?

A. Yes.

Q. Was she in good steering condition that day?

A. Yes.

Q. About as good as she ever is? A. Yes.

Q. How is your steering gear, in good shape?

A. Yes.

Q. Respond readily to it? A. Very quick.

Q. Very quick? A. Yes.

Q. In fact, it is very handy to turn, isn't it?

A. Yes.

Q. You had about the usual cargo?

A. About the usual cargo, yes. [281]

Q. Now, as you came down, as I understand it, you saw in the fog the steamer "Necanicum"?

A. Yes.

Q. And you at once blew one blast of the whistle?

A. Yes.

Q. And at once—what order did you give to your helmsman? A. Wheel aport.

(Testimony of E. W. Mason.)

Q. You say about 30 seconds thereafter, not getting any response, you blew a second one whistle?

A. Yes.

Q. And then about immediately you saw her turning off crossing your bow? A. Yes.

Q. And then you immediately gave "Full speed astern"? A. Yes.

Q. That was almost at once after giving your first whistle? A. Oh, no; some little while after.

Q. Well, now, let us see: What did you do then?

A. When?

Q. After you saw she was turning to starboard, toward your starboard?

A. Why, the ships were coming close together, to avoid a collision, have more room, seeing that he had put his wheel to run across our bow, I backed the ship full speed; as we were getting pretty close together then.

Q. Now, Captain, what way does the "Beaver" swing when you are going full speed astern from full speed ahead, prior to the time that you get sternway? A. I do not quite understand the question.

Q. Which way does your vessel turn in the water during the period between headway and sternway, when you are going full speed ahead and give your engines reverse full speed?

A. As long as she has got a little headway, she would naturally swing to starboard; with a right-hand propeller, it would tend to swing her some to starboard.

Q. Turn rather rapidly to starboard, would she

(Testimony of E. W. Mason.)

not? A. Why, yes, she would. [282]

Q. She would turn a good deal more rapidly than if she was merely on a port helm, would she not?

A. It all depends; if the ship was stopped and had sternway, she would make—

Q. (Intg.) I am talking about the period before she stops. You say she never stopped on that day?

A. She had two miles headway—she had a little headway, about two miles, before we came together.

Q. We will see about the amount later on. She never was stopped. What I am addressing myself to is entirely the condition while she is still running ahead with a reversing propeller. Now, as I understand it, you say that will very materially assist the helm in turning her to starboard.

A. Well, it is a matter of just which way the propeller is; if she is backing, it would not have so much effect on the ship if she had headway on. Now, if the ship was stopped, with a sternway, the propeller would naturally kick her around, because it is a right-hand wheel.

Q. You have a right-hand wheel, have you not?

A. Yes.

Q. Don't you know that the propeller on your vessel, when she is gradually slowing down, turns her very rapidly to starboard?

A. With headway on her?

Q. When she has headway, I mean during the period prior to her stopping.

A. It won't turn her so quick; it won't kick her her around so quick.

(Testimony of E. W. Mason.)

Q. How quick would she turn, do you know?

A. No. I have never tried her out.

Q. You made some experiments on the vessel after this collision, didn't you? A. Yes.

Q. Where? A. At sea, practically the same position.

Q. Did you make a report of those experiments?

A. A report to who?

Q. Did you make any report to anybody on them?

A. We have a [283] record of it, I believe.

Q. What did you do with it?

A. The general manager had it.

Q. When was that made, what date?

A. I don't just recall the date.

Q. When will the "Beaver" be in port again?

A. To-day, at one o'clock; she is due along about one o'clock.

Q. What time will she sail?

A. To-morrow at 12 o'clock she is due to sail.

Q. Now, as I understand it, immediately after the collision, you recognized that it was your duty under the United States statutes to stand by and assist this other vessel, but that you looked her over very carefully and saw that she was not injured to any extent and went on; is that right? A. Yes.

Q. You were very careful of that observation, weren't you?

A. I could see the ship, yes, very plainly.

Q. You had to make up your mind whether you were going to obey the statute?

A. Yes. I saw the ship for a couple of minutes,

(Testimony of E. W. Mason.)

and I remarked, "Well, there is nothing the matter with him, just got his stem shattered, and he is all right, nothing the matter with his bow—nothing the matter with the bow of his ship." In addition to that, I sent a wire to Mr. Hammond, a wireless to Mr. Hamond, in reply to one that he had sent telling him that the ship was all right, to proceed.

Q. Now, isn't it a fact that in reply to the wire from Mr. Hammond that you had received, you wired that the "Necanicum" had proceeded on her way to Eureka? A. In reply to his message?

Q. Yes.

A. He asked me that question, if she could proceed on her voyage, and I told him yes; I do not just recall the exact words, but all I could see was, there was something to the effect that all he had had was his stem shattered, that he could [284] proceed on his voyage.

Q. Now, as I understand it, all that you noticed of the other vessel was that she was backing away from you? A. When?

Q. Until after she had disappeared in the fog.

A. Yes.

Q. You did not leave her until she had disappeared, did you? A. No, she had disappeared.

Q. Before you moved away?

A. Oh, yes; that is, we could see her for two or three minutes, three or four minutes.

Q. You did not go away and leave her while she was in sight; she had disappeared before you left her, hadn't she?

(Testimony of E. W. Mason.)

A. Oh, no—yes, she had backed away in the fog; we could see that she was backing and straightening out, and we left her.

Q. Before straightening herself out? A. Yes.

Q. I thought she was going up the coast?

A. She was bound north.

Q. You say that when you last saw her she was pointing the same direction you were in and leaving you in the fog. How do you account for that?

A. Well, she was not exactly bound south—she was turned around to go north, she appeared to me, when I last saw her.

Q. That was, you say, about just as you left to go away, was it? A. Yes.

Q. That, you say, was about two minutes after the collision?

A. It might have been three or four minutes.

Q. Your bells will show that?

A. Along about that time.

Q. Your bells would show that?

A. No, not exactly.

Q. You could not leave without ringing the bells to leave, could you?

A. Do you mean when we got under way?

Q. Yes. A. No.

Q. So that, before you gave these bells to leave her, she had disappeared in the fog; that was it, was it not, or did you run [285] away from her standing there? A. Run away from her?

Q. Yes? A. Oh, no.

Q. Then I ask you, before you gave your bells to go

(Testimony of E. W. Mason.)

ahead, she had disappeared in the fog, hadn't she?

A. Yes.

Q. You are sure of that? A. Yes.

Q. Now, you say that she struck at about right angles; is that right?

A. Thereabouts, yes; anywhere along about between 45 and 60 degrees.

Q. What do you call right angles? How many degrees is a right angle?

A. That will be 90 degrees.

Q. When you say at right angles, you mean 90 degrees?

A. In along about there, anywhere around 60 degrees.

Q. Now, what is it—45, or 60, or 90? You can tell the difference.

A. I did not take any bearings of it; it appeared to be about that.

Q. About at right angles?

A. Yes, between 6 and 8 points, you might say.

Q. Between 6 and 8 points she struck? A. Yes.

Q. 45 degrees would not be that much, would it?

A. That would be 4 points.

Q. Your first statement that you made was that it was about 45 degrees.

A. Well, about that, yes, anywhere between 45 and 60, about from 4 to 6 points, in along through there, I did not take any bearings on it.

Q. But you did take particular notice of the condition of the bow, to determine whether or not you could leave her with safety? A. Yes.

(Testimony of E. W. Mason.)

Q. And that examination of her bow was just as careful an examination as the examination you made to find out whether there was a lookout there?

A. Oh, yes; the ship, when I was looking [286] at her, was not ten feet off.

Q. Did you ever put a glass on her at any time as you approached her? A. No.

Q. Nobody on the bridge did.

A. I did not pay any attention.

Q. You did not see anybody put a glass on her?

A. No.

Q. You say that you changed your course after Point Arena, or $2\frac{1}{2}$ miles thereafter? A. Yes.

Q. And that you ran 21 miles south of Point Arena before the collision? A. Yes.

Q. I note by the log, here, that you passed Point Arena abeam at 12:52. Is that correct?

A. If the log says so, it is correct.

Q. And that the collision occurred at about 2:18?

A. Yes; I recall that.

Q. What did you figure the rate of speed you were going at? A. 14.7.

Q. That is just 15 knots, isn't it?

A. A little shy of 15—14.7.

Mr. DENMAN.—We can calculate that in the argument.

Q. Who laid off the next course?

A. Who laid off the course?

Q. Yes. A. I laid off the course.

Q. You did that. Who did you give the orders to regarding it?

(Testimony of E. W. Mason.)

A. Well, I laid off the course; the second officer was on the bridge.

Q. Where did you lay it off? A. On a chart.

Q. Have you got that chart now?

A. I don't know; it might be on the ship. I don't know if the exact course is laid off there.

Q. What course did you say you instructed them to go on? A. Southeast by half east. [287]

Q. That was on what compass?

A. The bridge compass; we always steer by the bridge compass.

Q. How was the bridge compass calculated. You say $\frac{1}{2}$ east? A. South 50 degrees.

Q. What would that be on the pilot-house compass?

A. It is a little different there; about $\frac{1}{8}$ of a point, I believe.

Q. You laid that off, that course, for your next point of departure. What was the next point of departure; Point Reyes? A. Point Reyes.

Q. How much did you allow for the in-set between the two places?

A. We don't allow any in-set, unless it is not clear, and then we take soundings, and keep track of the ship from the soundings. There might be an in-set between Mendocino and Point Arena, and there might not be any in-set between any other points.

Q. I thought you just said that you expected an in-set as you came down there between San Francisco and Point Arena. That was your testimony yesterday.

A. Expect an in-set between Point Arena and Point Reyes?

(Testimony of E. W. Mason.)

Q. Yes, that is what you said yesterday on the stand. How about that?

A. Well, it is to be expected you would have an inshore in-set along the coast in southerly weather.

Q. When you came to Point Arena, it was so foggy you could not see the point, could you?

A. Yes, we could see the point.

Q. Could you see the lighthouse? A. No.

Q. You could not see the lighthouse? A. No.

Q. What sort of a fog was it, one of these lifting and setting fogs? A. Yes.

Q. Liable to come down on you any moment?

A. Yes.

Q. Liable to come down quite thick at any moment, was it not? [288]

A. The way it had been acting, it did not—it had not been acting that way.

Q. I mean it might on that coast at that time?

A. Yes.

Q. It might at any time: That is correct?

A. It might, yes.

Q. But you made no allowance for any in-set between those two places? A. No.

Q. Despite the fact that you had found an in-set previous to that time, the usual in-set, expected at that season of the year: That is correct, isn't it?

A. Yes.

Q. How much outside the 30-fathom curve off Point Reyes do you usually attempt to make?

A. Sometimes we are only a quarter of a mile off Point Reyes and sometimes five miles.

(Testimony of E. W. Mason.)

Q. What is your custom when you have in-set in foggy weather on the coast, how far do you attempt to pass it outside?

A. We do not figure so much on the in-set.

Q. Why don't you, if you have foggy weather?

A. Why don't I?

Q. Yes?

A. Because I don't operate my ship that way.

Q. Why don't you operate it that way?

A. That is my business.

Q. Then will you explain to the Court now exactly why, when you have an in-set, you should take a course that would bring you a quarter of a mile off of a headland, when you have 50 or 60 miles to run to?

A. That course would not have brought her a quarter of a mile off the headland.

Q. What would it be?

A. This course would take her about one and a half miles off.

Q. About that? A. Along about there.

Q. You had how much of an in-set since your last departure?

A. Somewhere about a mile, between half a mile and a mile.

Q. You could tell how much it was, couldn't you?

A. Yes.

Q. You say that despite that fact and despite the fact that you [289] had expected an in-set in that condition of weather and at that season of the year, you made allowance for it between Point Arena and

(Testimony of E. W. Mason.)

Point Reyes. That is correct, is it? A. Yes.

Q. What did you expect to do, supposing you found yourself set in?

A. Well, we would take soundings before we got to the point. We always set the ship on the same course again to make the point; there might be a set there to the northward and it might be a set to the southward; to off-set that, before we get to the point we take soundings and find if the ship is on the track; if she is not making the track, we will haul her in or out, whatever it may be.

Q. What made you pass Point Reyes, or Point Arena $2\frac{1}{2}$ miles before changing your course, when you ordinarily change it in front of the point?

A. Because we generally pass up there three miles and she was about $2\frac{1}{2}$ miles; that would off-set the distance, keeping that same course, before we hauled her down or hauled her in.

Q. You come and draw this course exactly as it was. That is southeast three-quarters east on here, whatever it was.

Mr. CAMPBELL.—I submit, if your Honor please, there is no evidence but what he has drawn it.

Mr. DENMAN.—Draw it in the way I have requested it.

Mr. CAMPBELL.—There is an insinuation in that that the course was not drawn as it was.

Mr. DENMAN.—Will you step down here, please, Captain. You drew southeast half east. A. Yes.

Q. I want you to draw it southeast three-eighths east. A. Southeast three-eighths east?

(Testimony of E. W. Mason.)

Q. Yes.

Mr. CAMPBELL.—That is southeast three-eighths east magnetic, [290] Mr. Denman?

Mr. DENMAN.—Yes, magnetic.

—A. That is southeast three-eighths east.

Mr. CAMPBELL.—Mark it down, Captain.

A. All right.

Q. Now, indicate it with letters, the last course that you have drawn; mark the southerly end of the line you have last drawn with the letter "D." A. Yes.

Mr. DENMAN.—Now, as I understand it, you laid out your course that day to pass Point Reyes about a mile and a half off? A. Yes.

Q. And you carried your course down, to make certain of it, to the point when you drew it at Point Arena? A. I don't understand.

Q. That is, you carried your course down to Point Reyes to see where it would bring you, didn't you?

A. Yes.

Q. As I understand, you did not want to get too far out or too far in?

A. You could go up alongside of Point Reyes, there is a pretty fine whistle there, and get a good departure from there.

Q. Would your vessel be quick enough to get out of danger if you got too close to the point?

A. It depends how close you wanted to get in; you don't want to get inside of the land, the point.

Q. She would handle pretty well in a tight place of that kind, wouldn't she? A. Yes.

(Testimony of E. W. Mason.)

Redirect Examination.

Mr. CAMPBELL.—Q. Captain, how did the course that you ran this day from Blunt's Reef to Point Arena compare with the usual compass course that you run on your voyages?

A. We steered the same course—you mean, how did she keep on the course? [291]

Q. Now, I am asking you about the compass course that you ran this day, from Blunt's Reef to Point Arena, how did that compare with the usual course that you run between those two points?

A. The same course we steer.

Q. After you got your course, your ship back on to the course between Point Arena and Point Reyes, how did that course compare with the usual course that you run? A. The same course.

Q. In your running up and down the coast, is it customary for you at any time to make allowances for any set-in of the current?

A. Not at the start of the course, no.

Q. Yesterday you said that the "Necanicum" entered four feet into the "Beaver." Will you explain what part of the "Beaver" that was?

A. I did not measure that; it was about four feet.

Mr. CAMPBELL.—I have here, if your Honor please, some photographs which I personally saw taken, and I believe that counsel has a duplicate set in his hands, and with his consent I should like to offer them in evidence.

Mr. DENMAN.—No objection.

(Testimony of E. W. Mason.)

(The photographs were marked Libelants' Exhibit "A.")

Mr. CAMPBELL.—I suggest, for convenience, that we number these various photographs, "A," "B" and "C" on the inside of the exhibit.

Mr. DENMAN.—Q. You have seen these before, haven't you, Captain? A. I don't recall.

Q. Have you seen any photographs of the injured portion of the "Beaver"?

A. Yes, I have seen some; I have a couple of copies aboard. I have not seen any others.

Mr. CAMPBELL.—Q. I hand you "Libelants' Exhibit 4" and ask you to explain, if you can, from these photographs, what portion [292] of the "Beaver" was penetrated to the extent of four feet, as you have testified. Go ahead and point out to the Court the portion of the "Beaver" that you said was penetrated this four feet.

A. This part up in through here—

Q. Refer to all the photographs, and see if you cannot find one that shows it more clearly than the others.

Mr. DENMAN.—Pick out your one, Mr. Campbell.

The WITNESS.—On account of the ship flaring out—

Mr. CAMPBELL.—Q. I will show you these photographs you have seen. You take these photographs and pick out the one which shows the penetration of the "Beaver" to the extent that you have testified. Which shows it the best to the Court?

(Testimony of E. W. Mason.)

A. These are practically the same. This picture, here.

Q. That is referring to the photograph marked "F" of Exhibit 4?

A. The ship is flared up in through here,—it was right in through here. There was quite a little dent in here where the anchor of the other ship penetrated the side of the ship, and a little place over here where the anchor on the other bow penetrated the ship; right in through here, the ship bulging out, she went deeper in there, I should judge about 4 feet, I did not measure it, just judged entirely by the eye.

Q. Captain, within what distance, at the speed that you were going, could you stop your ship?

A. Within half a mile.

Q. You said to Mr. Denman this morning that you saw the "Necanicum" in the fog, and that thereupon you blew your first passing whistle. Is or is not it a correct statement that you saw the "Necanicum" in the fog at the time you blew?

A. She was coming out of the fog; I could see the whole hull of the ship.

Q. At what angle, as you recall it, did the "Necanicum" lie to your steamer as you passed on out of sight of her. How was she [293] heading at that time?

A. Well, she was on a swing to go up toward the northward, heading toward the northward.

Q. Do you know of any uniform practice on this coast by which steam schooners and steamships have definite lanes up and down the coast, so that at one time they are closer in shore going one way than they

(Testimony of E. W. Mason.)

are in the other? A. No.

Q. Is it true or not true?

A. No, that is not true.

Recross-examination.

Mr. DENMAN.—Q. Captain, where did you measure your course when you determined you could stop the “Beaver” in half a mile? A. At sea.

Q. Where did you measure that course?

A. I don’t understand your question.

Q. Whereabouts did you measure the course at sea to determine that you could stop her in half a mile?

A. Why, it was up around to the northward of Point Reyes; I don’t know just exactly where it was; it was done here some eight months ago or a year ago.

Q. What was the point on shore that was just half a mile long that you went by?

A. We did not use a point half a mile long; we took observations from a barrel with a flag in it, put in the water, and also the log.

Q. You describe how you did it. You put a barrel in the water with a flag. What did you do then?

A. Then I had the chief officer there with the sextant; we put the engine, the telegraph “Full speed astern,” and the chief officer took observations of that, and the time the ship was stopped at a standstill, we had the lead in the water, and we got it then, got an observation from that, the distance she had run by the log and by the sextant showed that—I don’t just recall—but it was somewhere in the [294] neighborhood of 1,400 feet or 1,500 feet; 1,480 feet

(Testimony of E. W. Mason.)

or 1,500 feet. We have a record of it. It was in that neighborhood, about half a mile.

Q. Now, you are sure of that, are you, it was about half a mile?

A. Yes, I am positive of it. It was along about 1,500 feet.

Q. How do you make it half a mile in 1,500 feet?

A. I said about half a mile; it was in that neighborhood; it was between 1,400 and 1,500 feet, I said about half a mile.

Q. You could stop her dead in that time?

A. Yes.

Q. Now, of what good was your log to you in measuring out the distance?

A. We noted the log; we had the quartermaster there and blew the whistle and he read the log, the moment the engines were put full speed astern, and also noted the log at the time that the ship was stopped.

Q. But you said this morning you had not taken observations as to how much you had turned to starboard during that time? A. Turned to starboard?

Q. You did not take any observation of that?

A. Oh, yes.

Q. You said this morning you had not.

A. I don't recall saying that.

Q. I asked you whether you had ever determined how much your vessel would turn to one side or another.

A. One side or another—well, we didn't do that. We took the observation to see how quick we could

(Testimony of E. W. Mason.)

stop the ship, from the time she was going full speed ahead to full speed astern. I know we can turn the ship around in four minutes, make a complete circle with her.

Q. You can turn her around in four minutes?

A. Yes.

Q. Now, Captain, what was the condition of the weather when you made this experiment?

A. I don't just recall; if I remember right, it was calm, with a little light northwest wind. [295]

Q. Have you got a memorandum of that experiment anywhere. A. Our general manager has it.

Mr. DENMAN.—Have you got it, Mr. Campbell?

Mr. CAMPBELL.—I have a copy of it in my possession.

Mr. DENMAN.—I would like to see it. I would like to have you produce the original.

Mr. CAMPBELL.—I have not the original, I have a copy.

Mr. DENMAN.—Then I ask your client to produce it. It is in your client's possession.

Mr. CAMPBELL.—Q. Where is the original record, Captain? A. I don't know.

Q. Did you enter it in the log-book?

A. I don't recall.

Q. If you did enter it in the log-book, would the log-book be now on board the "Beaver"? A. Yes.

Q. When the "Beaver" comes in, Captain, will you make it your business to go down and see if the log-book has these entries in it, and if it has, produce it in court? A. Yes.

(Testimony of E. W. Mason.)

Mr. DENMAN.—If it is not there, I will ask you to produce it, Mr. Campbell.

Mr. CAMPBELL.—I am willing to produce the copy I have.

Mr. DENMAN.—Furthermore, I desire to have produced the record made by this gentleman to this principal, your client.

Mr. CAMPBELL.—I will produce anything you ask, anything they gave me a copy of. They are the same.

Mr. DENMAN.—Very likely that is so, but there may be mistakes made, such as the difference between half a mile and a quarter of a mile. I would like to see all the reports that have gone in along those lines.

Q. Now, Captain, you say that your bow flares out at the top? A. Yes. [296]

Q. And that the first thing that the “Necanicum” would necessarily strike would be that top?

A. Yes.

Q. And then she would strike along upon the flare as she went ahead and finally would strike the body of your vessel. Isn't that correct?

A. Yes; that top don't come right out, flare right out—

Q. It flares down gradually?

A. It flares up gradually.

Q. So it really is in the shape of a curving “V” from the water line up, a very slight curve at the bottom and bigger at the top? A. Yes.

(Testimony of E. W. Mason.)

Redirect Examination.

Mr. CAMPBELL.—Q. How many feet do you take to a mile? A. 2,080 feet.

Q. Feet to a mile?

A. 2,080 feet we take in a nautical mile, all the time.

Q. How many feet to a mile? A. 2,080.

Q. 2,080? How many feet to a statute mile?

A. What did I say, 2,080? 6,080 to the nautical mile.

Q. How many would there be to half a mile?

A. That would be 3,040.

Q. How do you reconcile to the Court your statement that your steamer was stopped within 1,400 or 1,500 feet and now you say a half a mile is 3,040 feet?

A. I said about half a mile; it was in about 1,500 and some odd feet the ship was stopped.

Q. Is that about half a mile or not? A. No.

Q. What is it about?

A. That would be one-third of a mile.

Q. It would be what?

A. You see, there is 6,080 feet to the nautical mile; 3,040 would be half a mile.

The COURT.—1,500 feet would be about a quarter of a mile.

A. About a quarter of a mile, yes. [297]

Recross-examination.

Mr. DENMAN.—Q. Is that the way you calculate the distance on the bridge when you are approaching another vessel? A. A nautical mile?

(Testimony of E. W. Mason.)

Q. No, the way you have calculated this quarter of a mile, and half a mile, and mile?

A. No. I said about half a mile. I said that offhand. I said about half a mile.

Q. You think that 45 degrees is a right angle?

A. Oh, no. I said the ship was approaching between 4 and 6 points.

Q. You said 6 and 8 points, Captain.

A. Did I say 6 and 8? Well, along about 6 points, yes.

Q. Might be 4, might it not?

A. No, a little more than 4.

Q. Why did you say 4 to 6, then, if it could not have been 4? That is all. No answer to that question.

Mr. CAMPBELL.—We will ask the witness to answer the question. I did not understand the witness refused to answer it, or could not answer it.

Mr. CAMPBELL.—Read the question, Mr. Reporter.

(The last question repeated by the Reporter.)

A. Well, it was more than 4.

Mr. DENMAN.—Q. It might have been $4\frac{1}{2}$?

A. It might have been $4\frac{1}{2}$; it was nearer to 6.

Q. So it was. You said 45, didn't you?

A. The first time you asked, I said about that, about 45 degrees.

Q. That was the impression you got, was it not?

A. Between 4 and 6 points, yes. [298]

Testimony of Joseph W. Ettershank, for Libelant.

JOSEPH W. ETTERS HANK, called for the libelant, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. Joseph William Ettershank.

Q. And what is your age? A. 31.

Q. What is your business? A. Master mariner.

Q. On what vessel are you presently employed?

A. The “Beaver.”

Q. How long have you been on her?

A. Over four years.

Q. What is your position?

A. Second officer at present.

Q. Were you on board the “Beaver” at the time of her collision with the “Necanicum”?

A. Yes, sir.

Q. What was your position on board of her at that time? A. Second mate.

Q. What time did you go on watch the day of the collision? A. 12 o’clock, noon.

Q. Where was she at that time, the “Beaver”?

A. North of Point Arena.

Q. Do you recall what time she passed the point?

A. About 8 minutes to one.

Q. What is that? A. 12:52.

Q. What time did you go off the bridge that day?

A. What time did I go off watch?

Q. Yes. A. About half-past 4.

Q. Were you or were you not on the bridge continuously from the time you passed Point Arena until after the collision?

(Testimony of Joseph W. Ettershank.)

A. I was on the bridge; yes.

Q. What course were you steering up to Point Arena as you approached it northwardly?

A. Southeast $\frac{1}{2}$ south, magnetic.

Q. When did you change your course after you passed Point Arena? A. I changed it at 1:02.

Q. What course did you then take after you changed it at 1:02? [299]

A. Southeast $\frac{1}{2}$ east, magnetic.

Q. And you had been running up to that time on what course? A. Southeast $\frac{1}{2}$ south.

Q. What was the condition of the atmosphere at the time you passed Point Arena?

A. A light fog at times. You could see 3 or 4 miles.

Q. Were you able to see the lighthouse at the point?

A. No, we could not see the lighthouse but we could make out the land, the point of land. The lighthouse was obscured.

Q. About what time did you first discover the presence of the "Necanicum"? A. About 2:14.

Q. Was the master on the bridge at that time?

A. Yes, sir.

Q. When had he come on the bridge?

A. A little after 2 o'clock.

Q. Had you said anything to him before he came on the bridge?

Mr. DENMAN.—Don't lead him please, Mr. Campbell, he is willing enough.

Mr. CAMPBELL.—I am not attempting to lead

(Testimony of Joseph W. Ettershank.)

the witness. I ask the witness whether he said anything to the captain.

Q. Had you, or not, said anything to the captain prior to his coming on the bridge? How did the captain happen to come on to the bridge?

A. I whistled down to him.

Q. For what purpose?

A. That it was going to shut in thick.

Q. About what time was that?

A. Oh, around just a little after 2 o'clock.

Q. How soon after you called him did the master come on to the bridge? A. Immediately.

Q. Will you state whether or not he left the bridge from that time on until after the collision?

A. No, sir. He was there all the time. [300]

Q. What kind of weather did you have from the time that the master came on to the bridge up to the time that you saw the "Necanicum"?

A. From the time the master came on the bridge until the time we sighted the "Necanicum"?

Q. Yes. A. It closed in foggy. It was foggy.

Q. Was anything done with your whistles during that period?

A. We set our automatic whistle blowing.

Q. How does the automatic whistle act or operate?

A. It blows 5 seconds out of every minute; 55 seconds interval. A 5-seconds blast.

Q. What do you do to start the automatic whistle blowing?

A. There is a lever there and you just turn it right over.

(Testimony of Joseph W. Ettershank.)

Q. Does the whistle blow any differently, the automatic, does it blow any differently from the steamship's regular whistle that you use for passing purposes? A. What is that?

Q. Is the whistle that blows by the automatic arrangement any different from the passing whistle?

A. It is an electric whistle.

Q. But is it a different whistle?

A. No. It is the same tube, the same instrument.

Q. It is the same brass tube? A. Yes, sir.

Q. During the time you were in the fog and up to the time that you saw the "Necanicum," after you turned on the automatic, did your whistle ever fail to emit a sound?

A. No, sir, it was blowing all the time.

Q. What kind of a sound does it give forth?

A. It gives a good sharp report, blast.

Q. What size whistle is it?

A. I never measured it.

Q. How large a whistle would you say it was?

A. About that long (illustrating).

Mr. DENMAN.—Q. What is that; about 18 inches? [301]

A. About that, 18 or 20 inches, yes, sir.

Mr. CAMPBELL.—Q. How does the sound compare with the average whistle on steam vessels going up and down the coast, as you have observed them?

A. It is classed as one of the best whistles.

Q. What has been your observation in that regard? What has been your observation as to the character of sound your whistle gives forth as com-

(Testimony of Joseph W. Ettershank.)

pared to the character of sound from the whistles on other vessels?

A. It has been said that other steamers have heard it a long ways off. It has always been classed as a good whistle.

Q. At any time after starting the automatic up to the time of the collision I ask you whether or not any water got into your whistle so as to prevent a sound coming from the whistle and yet steam passing into the whistle and from the whistle?

A. No, sir; the whistle was blowing clear.

Q. Did you see the "Necanicum"? A. Yes, sir.

Q. What first called your attention to the "Necanicum"?

A. I made out the object of a vessel right coming out of the fog.

A. Was any report received by you from anyone as to the presence of the "Necanicum"?

A. The lookout-man sang out.

Q. Where was the lookout-man stationed?

A. Forward, on the bow of the ship.

Q. What was the bearing of the "Necanicum" at the time you first saw her?

A. Almost ahead, a little bit on the port bow.

Q. How much on the port bow?

A. Oh, a couple of degrees.

Q. Where was the master at that time?

A. Standing amidships, a little bit on the starboard side of the bridge.

Q. How far off do you think that the "Necanicum" was at that time? [302]

(Testimony of Joseph W. Ettershank.)

A. About a mile distant.

Q. What was done by your vessel from that time on?

A. The captain changed his course and blew one whistle.

Q. What change of course was made?

A. He ported.

Q. Who gave the order to port?

A. The captain.

Q. To whom? A. To the quartermaster.

Q. Where was the quartermaster stationed?

A. In the pilot-house.

Q. Where was the pilot-house with respect to your bridge?

A. Just below where the captain was standing, right in the fore part.

Q. Go on and describe to the Court the navigation of your vessel from that time on.

A. The captain blew one whistle and waited for an answer; there was no answer. In the matter of half a minute he blew again, and he says, "Port more; put her hard aport." The ship was swinging to starboard. The "Necanicum" did not seem to change her course. She started to come toward us. I was standing by the telegraph there, and the captain said, "Full speed astern"; I put the telegraph to full speed astern, and the engineer answered it. At the same time the captain blew three whistles to indicate that our engines were going astern.

Q. Who worked the telegraph? A. I did, sir.

Q. When you observed the change in course on

(Testimony of Joseph W. Ettershank.)

the part of the "Necanicum," which way did she swing with respect to your vessel?

A. The "Necanicum" was swinging toward us.

Q. And to do that under what helm must she have been operating at that time?

A. The starboard helm.

Q. What would the exchange of one whistle require her to have done; what helm should she have been under when one whistle was exchanged? [303]

A. She should have put her helm to port.

Q. And what would have happened then?

A. We would have cleared each other.

Q. She would have gone to starboard too?

A. Yes.

Q. At what angle did the vessels come together?

A. Almost right angles.

Q. Where was your vessel struck?

A. Port bow.

Q. How far from the stem? A. About 12 feet.

Q. What became of the "Necanicum" after the collision? A. You mean immediately after?

Q. Yes. A. She bounced off away from us.

Q. How was she headed immediately after the collision? How was she headed with respect to your vessel immediately after the collision?

A. She was swung around.

Q. Which side of her could you see after the collision? A. The starboard side.

Q. How did she angle toward your vessel? What was her position? A. Like that (indicating).

Q. On an acute angle, with her starboard side to

(Testimony of Joseph W. Ettershank.)

you? A. Yes, sir, her starboard side.

Mr. DENMAN.—Q. You mean pointing nearly parallel? A. Pretty near; yes, sir.

Q. In the same direction? A. Yes, sir.

Mr. CAMPBELL.—Q. What speed, if any, was your vessel making at the time of the collision, in your judgment? A. About 14.7.

Q. At the time of the collision?

A. Oh, at the time of the collision we had a little headway on her but practically stopped.

Q. What was the 14.7 speed you mentioned?
[304]

A. That was the speed the ship had been making up to the time of the collision.

Q. You say up to the time of the collision; was that speed of 14.7 affected at all by your reversing before the collision?

A. Sure; that was the actual time we made from the light-ship down to Point Arena, 14.7.

Q. How well could you see the “Necanicum” immediately prior to the collision? Could you see the “Necanicum” with any clearness, or not, before the collision? A. Sure, we could see her clear.

Q. Did you observe whether or not there was anyone on her fore-castle-head? A. No, sir.

The COURT.—Q. Do you mean by that that you did not observe?

A. I did not see nobody; no, sir.

Q. I don’t understand your answer. The question is, did you observe whether there was anybody there or not?

(Testimony of Joseph W. Ettershank.)

A. No, sir, there was nobody there.

Mr. CAMPBELL.—Q. Could you or could you not see the forecastle-head so as to know whether there was anybody on there?

A. Sure I could see the forecastle-head because we were away up higher than she was; I could see if there was anybody there.

Q. Did you see anyone on the “Necanicum’s” bridge? A. No, sir.

Q. Did you after the collision? A. Yes, sir.

Q. Describe what you saw there?

A. I saw a man with a brown shirt and no hat. He came up on the starboard side of the bridge and he said, “Why aren’t you blowing your whistle”?

Q. How far off was the “Necanicum” at that time?

A. She was not much over two ship lengths; let me see—a couple of hundred feet, 200 or 300 feet away.

Q. What was the condition of the weather as to wind and sea? [305]

A. There was a southerly wind, a moderate sea.

Q. How would you describe the force of the wind?

A. It was not blowing over 3 or 4 miles an hour.

Q. What was the condition of the water?

A. A small sea on.

Q. I hand you a book and ask you what it is?

Mr. DENMAN.—One moment. I object to the witness refreshing his memory from the log if it is not shown that he cannot testify from his memory without it. That is not evidence for the ship.

(Testimony of Joseph W. Ettershank.)

The COURT.—Does he need anything to refresh his memory?

Mr. CAMPBELL.—I have not asked him for a single thing out of the log. I am simply asking him what this book is.

The COURT.—Well, that is true, too; it has been used around here though as the log.

Mr. CAMPBELL.—I simply want to identify it as the ship's log.

Mr. DENMAN.—We admit that.

The COURT.—And we have been using it around here during this trial as the ship's log.

Mr. DENMAN.—I object to the witness reading it before he testifies to any matter.

Mr. CAMPBELL.—I will ask the question that I was leading up to.

Q. Who made the entries in this log from the time you were on the bridge until you left the bridge?

A. Myself.

Q. In recording time in a bridge log do you note the half minutes?

A. No, sir; it is to the next minute; we take the time to the next minute.

Q. If time is given in a ship's log, which you have written in, as of a certain minute, what interval of time may that minute represent? I want to know whether or not if a certain event is recorded as of a certain minute, I want to know whether or [306] not that means that that event occurred just exactly on the minute? A. Yes.

Q. Supposing an event occurred—

(Testimony of Joseph W. Ettershank.)

The COURT.—That is not in accordance with your former statement. Do you know just what is meant by this question?

A. He means if there is something that happened like now, for instance, whatever time it is now, say 11 o'clock, and it was but a half minute to 11—

Q. You would record it at 11?

A. Yes, record it at 11. Is that what you meant by your question, Mr. Campbell?

Mr. CAMPBELL.—That is what I had in mind. The Court drew it out more clearly than I did.

The COURT.—That is what I gathered from his statement, that it might occur on the half minute but it would be recorded as of the next minute.

Mr. CAMPBELL.—Yes, your Honor.

Q. Is there any equipment about the “Beaver’s” whistle which prevents water getting into the whistle so as to stop the emitting of sound?

A. No, sir. There are drains to it; there is a trap where all the water runs into.

Q. How many years have you been on the “Beaver”? A. Four years.

Q. Were you on her at the time of her collision with the “Selje”? A. Yes, sir.

Q. During all the time that you have been on the “Beaver” will you state whether or not you have ever known of steam being turned into that whistle for the purpose of blowing the whistle without the whistle emitting sound? A. It has always blown.

Q. In coming down the coast from Blunt’s Reef to Point Arena how did the course that you were then

(Testimony of Joseph W. Ettershank.)

on compare with the usual course that you take?

A. She was a little close. [307]

Q. Why? How did the compass course you were running compare with the course you usually run? What compass point did you take from Blunt's Reef to Point Arena? A. Southeast $\frac{1}{2}$ south.

Q. How did your compass course then compare with your usual course on that run?

A. Sometimes she makes in and sometimes she makes out.

The COURT.—Q. That is not the question; he is asking about the course itself.

A. That is the regular course.

Q. The regular course? A. Yes, sir.

Mr. CAMPBELL.—Q. How did the course you were on after having changed the course from Point Arena to Point Reyes compare with your usual course?

A. That was our usual course for Point Reyes.

Q. I will ask you whether or not, in your judgment, from what you saw of the "Necanicum," she was stopped at the time of the collision?

A. No, sir, I think she had headway on her.

Q. From the position that the two vessels were in as they approached each other prior to the collision would there have been any collision if at that time the "Necanicum" was stopped or going astern? What is your judgment if as the vessels approached each other prior to the collision the "Necanicum" had been stopped; would there have been any collision? A. No, sir.

(Testimony of Joseph W. Ettershank.)

Q. If it be a fact that prior to the collision the "Necanicum" was actually going astern from one to 4 miles per hour I will ask you whether or not there would have been any collision? A. No.

Q. Was there any time after the "Necanicum" and "Beaver" were in sight of each other when the "Beaver" was approximately $\frac{3}{4}$ of a mile ahead and $\frac{3}{4}$ of a mile to the starboard of the [308] "Necanicum"? Did you hear that question?

A. Repeat it again, please.

Q. Was there any time after the "Necanicum" and the "Beaver" were in sight of each other when the "Beaver" was approximately $\frac{3}{4}$ of a mile ahead and $\frac{3}{4}$ of a mile to the starboard of the "Necanicum"? Do you understand the question?

A. No, sir.

Q. My question is, at any time after the "Beaver" and the "Necanicum" came within sight of each other was the "Beaver" at a point or a position $\frac{3}{4}$ of a mile ahead of the "Necanicum" and $\frac{3}{4}$ of a mile to the starboard of the "Necanicum"? I will put the question this way: At any time after the "Necanicum" came in view of the "Beaver" was the "Beaver" on a course which would have carried her $\frac{3}{4}$ of a mile to the starboard of the "Necanicum"? Can't you understand the question?

A. No, sir, I don't understand it.

Q. After these two vessels came into sight was there any time when the "Beaver" was on the course so that she would have passed the "Necanicum" $\frac{3}{4}$ of a mile to the "Necanicum's" starboard?

(Testimony of Joseph W. Ettershank.)

A. No, sir.

Q. Was she ever at any time on a course so she would have passed the "Necanicum" $\frac{1}{2}$ a mile to the "Necanicum's" starboard?

A. The "Necanicum" came closer to us all the time when we were approaching.

Q. Answer my question, if you can do so. Was there any time after the two vessels came into sight when the "Beaver" was on such a course that she would have passed $\frac{1}{2}$ a mile to the starboard of the "Necanicum"?

The COURT.—The question is rather confusing in view of the witness' own testimony that the vessels, when discovered, were practically dead ahead. It stands to reason that if [309] they swung to starboard and the other vessel did not approach them they might be on a course that would carry them that far away.

Mr. CAMPBELLI.—Q. When the "Beaver" was $\frac{1}{2}$ a mile distant from the "Necanicum" was she or was she not at that time at a position which would have carried her $\frac{1}{2}$ a mile to the starboard of the "Necanicum" if she continued her course?

A. If the "Necanicum" continued her course, do you mean?

Q. If both vessels continued their courses?

A. Yes, if we kept our own courses, if the "Necanicum" had not altered the wheel.

Q. Which way would you have passed?

A. We would have passed on the port side of the "Necanicum."

(Testimony of Joseph W. Ettershank.)

Q. If before there was any alteration in the courses of the two vessels, and after they came in sight of each other, the two vessels had held on to the courses which they were then pursuing, would the "Beaver" have passed $\frac{1}{2}$ a mile to the starboard of the "Necanicum"?

A. You mean when we first met each other?

Q. When you came into view.

The COURT.—Q. Supposing neither ship changed its course after you came into view, what then would have happened?

Mr. CAMPBELL.—No, that is not my question, your Honor.

The COURT.—That will reach it in the same way.

Q. What would have happened if neither ship changed its course?

A. We would have come on head on.

Q. Head on. A. Yes, sir.

Q. Was there any time between the time you first saw the "Necanicum" when if neither ship had changed its course they would have passed $\frac{1}{2}$ mile apart?

A. Yes, when we changed our course, when we ported our helm. [310]

Q. Was there any time in that interval where if neither ship changed its course you would have passed $\frac{1}{2}$ a mile apart?

A. Yes, sir, we would have passed—it would not be $\frac{1}{2}$ a mile, though. We would have passed them clear. After we sighted them we ported our helm.

Q. I understand that, but let us assume that you

(Testimony of Joseph W. Ettershank.)

went on the courses laid?

A. No, we would have come together.

Q. If neither ship had changed the course after you first sighted you would have come together?

A. Well, pretty near.

Q. Was there any time between the time the vessels were first sighted and the time when you did collide that if neither ship had changed its course they would have passed $\frac{1}{2}$ a mile apart? A. No.

Q. There was no such time? A. No.

The COURT.—Of course, that follows from his first statement. That seems to me what you are trying to get distinctly into the record.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. DENMAN.—Q. Where did this collision take place? A. South of Point Arena.

Q. How far south? A. About 21 miles.

Q. 21 miles south? A. Yes, sir.

Q. Did you make that calculation of 21 miles south yourself?

A. You could figure it from the time we run; yes, sir.

Q. From the time you run? A. Yes, sir.

Q. And how long did you run, how many minutes did you run? A. How many minutes did we run?

Q. Yes. A. About 86 minutes.

Q. Wasn't it 84? A. I said about 86. [311]

Q. As a matter of fact, was it not 84 minutes? What time do you figure that the vessels came together? A. 2:16 or 2:18.

(Testimony of Joseph W. Ettershank.)

Q. It really was 2:16, was it not?

A. What is that?

Q. It really was 2:16 that they came together, was it not? A. No, sir.

Q. Did you note down in your log-book at the time?

A. Yes—no, I did not note it in the log-book.

Q. When did you write up your log-book with reference to that? A. After it cleared up.

Q. After it cleared up that day? This is in your handwriting, is it not? A. Yes, sir.

Q. You did not make any alterations of any kind in this afterwards, did you? You did not make any changes in it after you had first written it up? I mean this is just the way you wrote it up the first time? A. Yes, sir.

Q. You didn't rub out anything and rewrite it?

A. There are a couple of places there I made a mistake and I changed it right there at the time I was writing it.

Q. Do you remember what the mistakes were that you made?

A. There was one place off Point Arena, I rubbed it out—the distance of miles, and I just put it approximately.

Q. You did not make any change in the description of the weather or in the happenings at the time of the collision, did you? A. No, sir.

Q. You are sure you did not make any alteration in the description of the collision afterwards?

A. No.

(Testimony of Joseph W. Ettershank.)

Q. You are absolutely sure of that, are you?

A. Yes, sir.

Q. You did not make any change as to the distance that you saw the vessel off from you, did you?

A. No, sir. I had it rubbed out there because I forgot to put down—I wrote something else and I rubbed it out and I had to put it down again. [312]

Q. You did make a change in the distance that the vessel was off?

A. No, sir, I put something else there altogether.

Q. What else did you have there?

A. I got ahead of my writing, or something, and I rubbed it out there.

Q. What did you have when you got ahead of your writing?

A. I omitted the one; I just put miles; I rubbed it out and just put one mile.

Q. You didn't make any change as to the time when the vessel was sighted, did you? A. No, sir.

Q. You are sure of that, are you?

A. Sure, yes, sir.

Q. You swear to that? A. Yes, sir.

Q. And you didn't make any changes as to the condition or the description of the fog? A. No, sir.

Q. You are sure of that, absolutely?

A. Yes, sir.

Q. That is to say, the description of the fog at Point Arena and after you had the collision is exactly the way you wrote it the first time?

A. Yes, sir.

Q. You will swear to that, will you?

(Testimony of Joseph W. Ettershank.)

A. Yes, sir.

Q. Absolutely? A. Yes, sir.

Q. You would have remembered it if you made any change in the condition of the fog, would you not?

A. Yes, sir.

Q. When did you notice that you made this mistake with regard to the distance being about a mile ahead, and making that alteration in the log, when did you notice that mistake?

A. After I wrote it up I read it over and I noticed it then.

Q. After you read it over you noticed that?

A. Yes, sir.

Q. Did you use the same pencil when you made the change? A. Yes, certainly.

Q. You say here at one place, "the ship swung about 2 points to starboard"; why did you make a change in the 2 points to starboard? [313]

A. I don't remember making any change.

Q. And you used a different pencil on the "2" there, didn't you? A. Not that I know of.

Q. Could you possibly have used two pencils on this? A. No, sir.

Q. You might have used two pencils on this, might you not? A. No, sir.

Q. You are sure of that, are you, Mr. Ettershank?

A. I was only using the one pencil when I wrote it up there at that time.

Q. Did you write it up at any other time?

A. No, sir; I mean when I was writing my log up there.

(Testimony of Joseph W. Ettershank.)

Q. When did you write this up with reference to the collision? A. After the collision.

Q. After the collision? A. Yes, sir.

Q. Now, as you go down in this book I notice, for instance, that you have here "2 o'clock"; I am referring now to Thursday, October 30th. You have "2 o'clock, 4:56:34"; was that entry made right at the time? A. Yes, sir.

Q. And take here the entry, "1:02, southeast 86 east"; was that made at the time? A. Yes, sir.

Q. And here is "2:25, slow to 70 degrees, thick fog" etc.; was that made at the time, right on the bridge?

A. I took a little pad and entered it on there.

Q. Was this entered in the book at that time?

A. No, sir, not in the book.

Q. Where is that pad?

A. Oh, we have scratch-pads up on the bridge.

Q. Where is it now?

A. I don't know where it is now.

Q. But this was entered in the book right at the time? A. Yes, sir. [314]

Q. But this was not entered in the book at that time? A. No, not immediately.

Q. Why not?

A. Because I had not got that written up yet.

Q. When did you enter this on the book?

A. I entered that after I finished copying that down.

Q. And when did you finish copying that down?

A. Right after the collision.

(Testimony of Joseph W. Ettershank.)

Q. How long afterwards? A. About an hour.

Q. Was it an hour afterwards?

A. About that; yes, sir.

Q. Where were you when you wrote it up?

A. On the bridge.

Q. You were on the bridge? A. Yes, sir.

Q. Who was with you when you wrote it up?

A. Who was with me on the bridge?

Q. Yes. A. I was by myself.

Q. At the time of the collision you were too busy, were you not, to be taking any scratch notes?

A. I took them down afterwards, I took a memo. of them.

Q. You took them down after the collision?

A. Yes, sir.

Q. And you made estimates of these different times you have entered?

A. I took the time, yes, sir.

Q. You made estimates after the collision was over of the different times and put them down on the scratch-pad; is that right? A. Yes, sir.

Q. When you were off Point Arena, as I understand it, the fog was thick enough so at a mile distant you could not see the lighthouse, but you could see the point; is that so?

A. We could see over a mile then when we were off Point Arena.

Q. I am asking you if at a mile distant you could see the point? A. You mean from the land?

Q. Yes. A. We could see further than a mile.

Q. How far could you see, a mile and a half? [315]

(Testimony of Joseph W. Ettershank.)

A. Around 3 or 4 miles.

Q. I thought you said you were only a mile and a half from the lighthouse and could not see it?

A. I did not say we were a mile and a half from the lighthouse.

Q. How far were you from the lighthouse at the time?

A. Approximately about $2\frac{1}{2}$ miles off it.

Q. $2\frac{1}{2}$ miles off it? A. Yes, sir.

Q. Was that the usual distance?

A. Well, we pass about 3 miles off.

Q. Had you set your course to pass it $2\frac{1}{2}$ miles or 3 miles off when you came down there?

A. The course had been set to pass it, yes, sir. That is the regular course that carries us past it.

Q. About $2\frac{1}{2}$ miles?

A. 3 miles, anywhere in the neighborhood of 3 miles.

Q. Would you say 3 miles or $3\frac{1}{2}$ miles or $2\frac{1}{2}$ miles? How would you expect to strike it there?

A. About 3 miles off.

Q. Then you were not, as the captain says, about a mile in from your regular course?

A. A mile from the lighthouse?

Q. No, a mile inshore from your regular course.

A. If we were only $2\frac{1}{2}$ miles off we were inside our regular course; yes, sir.

Q. Were you a mile inside it?

A. I did not measure it, or anything; I don't know that it was a mile, but I know it was inside.

Q. Can't you tell a mile at sea when you see it be-

(Testimony of Joseph W. Ettershank.)

tween $2\frac{1}{2}$ and $3\frac{1}{2}$ miles off?

A. Yes, approximately.

Q. Approximately? A. I can judge it.

Q. You think it might be a mile or it might be $\frac{1}{2}$ a mile, or what? [316]

A. In the neighborhood of $\frac{1}{2}$ or $\frac{3}{4}$ of a mile.

Q. You could not tell within a quarter of a mile the distance? A. I could not swear to it.

Q. Could you tell the difference between $\frac{1}{2}$ a mile and a mile, to swear to it?

A. That we were inside?

Q. Yes. A. Yes, sir.

Q. You think it might be a mile or it might be $\frac{1}{2}$ a mile? A. I would say between that.

Q. Between those two?

A. Yes, sir, somewheres around there.

Q. Now, as I understand it, when the vessel came in sight from you you at once ported your helm and blew one blast?

A. One blast of the whistle, yes, to indicate—

Q. (Intg.) Just a moment. Just follow me in my questions. And you ran on then for a number of seconds? A. Yes, sir.

Q. And you blew a second one blast and put your helm hard over; you first put it over to port?

A. Yes.

Q. And when you gave the second blast you put it hard over?

A. Yes, sir; the captain gave the order; I didn't give it.

Q. Well, you heard it? A. Yes, sir.

(Testimony of Joseph W. Ettershank.)

Q. You are sure you heard it? A. Yes, sir.

Q. You swear to that? A. Yes, sir.

Q. That was a few seconds after the first one?

A. Yes, sir.

Q. And then almost immediately after that you noticed the "Necanicum" turning into you?

A. No, sir, she blew a whistle to us.

Q. I say almost immediately you saw her turning in when that whistle blew?

A. When we were hard over.

Q. You were hard over. You did not put your wheel hard over until you saw her turning into you? The reason you put your wheel hard over was because you saw the "Necanicum" turning into you; was not that it? A. Yes, sir. [317]

Q. And you felt then that as she had turned toward you, you were likely to have a collision and it was necessary to put it hard over to avoid being run into; that is right, is it not? A. Yes, sir.

Q. And then almost immediately after you gave full speed astern, did you not? A. Yes, sir.

Q. That is to say, there was not more than 15 seconds between putting your helm hard over and going full speed astern, was there?

A. About that, I guess.

Q. How was your vessel loaded on that day?

A. The draught, do you mean?

Q. Yes. I don't want it exactly, but just about.

A. Coming south all the time we are loaded from 16 to 18 feet forward and draw from 19 to 20 aft.

Q. That is to say, there was a difference of say 2 or

(Testimony of Joseph W. Ettershank.)

3 feet between forward and aft?

A. Yes. You always have her down by the stern 2 or 3 feet.

Q. That is her best steering condition, is it?

A. Yes, sir, she steers better.

Q. How did she steer on that day?

A. She was steering good.

Q. She is pretty quick on the helm, is she not?

A. Yes, sir.

Q. Immediately after the collision it was your duty, was it not, under the law, to stand by until you saw that the "Necanicum" did not require any aid?

A. We could see when she left us there—

Q. (Intg.) I say that is your duty, is it not?

A. Yes, sir.

Q. Did you look to see whether she required any assistance?

A. We could see that she was flying light. The stem of the ship was busted up a little. That is all we could notice.

Q. The upper part of the stem? A. Yes, sir.

[318]

Q. Not down by the lower part?

A. No, sir, it was just by the fore-foot, where she turns there.

Q. Would you agree with the captain that she was not injured 10 feet above the water-line?

A. Well, I did not—

Q. (Intg.) You did not notice that particularly, did you? A. No, sir.

Q. You did not notice particularly the condition of

(Testimony of Joseph W. Ettershank.)

the bow of the vessel?

A. Yes, sir, I seen the bow. You mean the "Necanicum," do you?

Q. Yes, the "Necanicum."

A. Yes, sir, I could see her bow. The stem was all that was busted up.

Q. That is, the upper part or the lower part?

A. Well, halfway up.

Q. From halfway up up to the top?

A. Yes, sir, because she turns like that you know, rounded.

Q. But you would say that for 10 feet above the water-line she had no injury at all?

A. Well, somewheres around there, 6 or 8 feet I guess from the water-line.

Q. You did not leave her though until she disappeared in the fog, did you? A. No, sir.

Q. And she disappeared in the fog before you gave your bells full speed ahead, did she not?

A. We started to straighten the ship out; we were away off our course and we gave a starboard helm to go ahead and straighten her out.

Q. You were not away off your course, were you?

A. We were naturally away off our course.

Q. You said away off your course; you meant that, didn't you? A. We were off our regular course.

Q. And you could not come around under say half speed, but you felt you were so far off that you had to go full speed to get her around; is that it? [319]

A. Well, the ship was practically stopped then; you had to get some headway on her to make her steer.

(Testimony of Joseph W. Ettershank.)

Q. Practically stopped, was she? How much way did you have on, do you think?

A. At what time do you mean?

Q. When you started to go ahead after the collision?

A. We did not have much, we had very little way.

Q. You say the "Necanicum" had disappeared before you left that neighborhood—in the fog; how long before you left had she disappeared? You did not desert her while she was in sight of you, did you? You could not do that, could you?

A. We could not, no.

Q. How long before you left had she disappeared in the fog?

A. It was only the matter of a few minutes. The fog came down.

Q. You say a few minutes; as a matter of fact, before you gave your bells full speed ahead to continue on your course she had disappeared in the fog, had she not?

A. About the same time, yes, sir, when she disappeared.

Q. You did not give your bells full speed ahead and leave her there when she was in sight, did you?

A. What is that?

Q. You didn't give your bells full speed ahead and desert her there when she was in sight, did you?

A. We straightened out our course.

Q. How long did it take you to straighten her out on her course? A. It took 2 or 3 minutes.

Q. Don't you know, as a matter of fact, it only

(Testimony of Joseph W. Ettershank.)

took you a minute to do it?

A. She would not come back on her course in a minute.

Q. She would not; she was that far off, was she?

A. It took a minute and a half or 2 minutes any-way.

Q. Don't you know that the bells on your ship at the moment [320] of the collision were full speed ahead, and a minute after that half speed; were not those the bells that were given from the bridge?

A. Full speed ahead at the time of the collision?

Q. Just a moment after the collision?

A. No, sir.

Q. How long after the collision did you give the bells full speed ahead?

A. The captain was handling the telegraph then after we hit.

Q. I know, but you could hear it ring, could you not?

A. Yes, I could hear it ring, certainly I could.

Q. How soon after the collision did you give full speed ahead? A. Right after the collision.

Q. Immediately after the collision, was it not?

A. Yes, sir.

The COURT.—We will take a recess now until 2 o'clock.

(A recess was here taken until 2 p. m.) [321]

AFTERNOON SESSION.

JOSEPH W. ETTERS HANK, cross-examination resumed.

Mr. DENMAN.—Q. I want to ask you what exam-

(Testimony of Joseph W. Ettershank.)

ination you made of your vessel after the collision occurred.

A. I had the carpenter sound the bilges and the mate look over the bow. He went forward. He came back and told the captain the damage was above the water-line. The carpenter come back and said there was no water in the No. 1 bilges.

Q. Did you go out to the side of the bridge and look to see what damage had been done?

A. I cannot see from the bridge.

Q. I say did you go out to the side of the bridge and try to look at the injury on the bow

A. From the corner of the bridge you could see the rail all cut; the damage was on top.

Q. You noticed the vessels when they were coming together at that point, did you? A. Yes, sir.

Q. Do you recall which vessel was the higher vessel of the two? A. Well, I should say—

Q. Let me change that question. Which vessel had the forecastle-head the higher above the water?

A. The “Necanicum” because she cut our top rail off.

Q. She cut your top rail off? A. Yes, sir.

Q. Now, to come back, you say that the carpenter made an examination by sounding the bilges?

A. Yes, sir.

Q. What did he report?

A. He said they were making no water.

Q. That was done almost immediately after the collision, was it not? A. Yes, sir.

Q. In the meanwhile you and the captain examined

(Testimony of Joseph W. Ettershank.)

the stem of the "Necanicum" to see whether you had to stand by her? A. We could see it, yes, sir.

Q. I mean you examined it for the purpose of seeing whether [322] you had to stand by?

A. We could see there were no planks torn loose from the stem, or nothing; it was just the stem slivered.

Q. Did you notice any cracks on the side? Did you see those? A. What do you mean?

Q. Any cracks on the side of the vessel, the mashing in of the stem? A. We could not see any.

Q. Could you see them anyway at 100 yards distance?

A. If they were big or if they were open; the planks would have been separated and then we could notice them.

Q. They might have been small and still admit water? A. Yes, they might have been small.

Q. Coming back to the condition of the weather, at the time that you passed Point Arena, as I understand it, you say that the fog was then obscuring the lighthouse at the point? A. Yes, sir.

Q. But you did not think it was necessary to call the captain at that time?

A. The captain was around then.

Q. The captain was around then?

A. Sure, changing the course.

Q. Would you have called him if he had not been around, on account of the fog?

A. Yes, sir, it is a standing order.

Q. It is a standing order? A. Yes, sir.

(Testimony of Joseph W. Ettershank.)

Q. You say that the fog continued light like that until you called the captain up?

A. Yes—no, for 3 or 4 miles you could see. It was clearer offshore than it was inshore.

Q. I am now talking about the time between passing Point Arena and the time you called the captain; you had the fog up and down, did you not, during that period of time? A. Yes, sir.

Q. Sometimes it set in thicker than at others and finally at 2:05 it began to set in thick and you called the captain? A. Yes, sir. [323]

Q. And although the fog was rising and falling up to that time you had not thought it necessary to call him?

A. He knew the condition of the weather himself.

Q. What did you call him for then?

A. Because it was getting thicker.

Q. You used the expression this morning “shutting in thick”; that is correct, is it?

A. Shutting in thick, yes, sir.

Q. When your vessel is going full speed ahead and the order is given full speed astern with your helm hard aport, does she turn more rapidly or less rapidly with the reversing propeller?

A. With the helm hard aport and going astern that would help her more to swing to starboard.

Q. The fact is she would swing very fast, would she not? A. Yes, sir.

Q. You remember testifying in the “Beaver”—“Selje” case, do you not, on that point?

A. Yes, sir.

(Testimony of Joseph W. Ettershank.)

Q. Before she would stop, it is a fact, is it not, that she would go over somewhere about 4 points, swinging on that helm, going from full speed ahead to full speed astern; that is right, is it not?

A. That she would swing 4 points?

Q. Yes. A. She did not do it that day.

Q. She did on the day of the "Beaver"—"Selje" collision, did she not?

A. She was swinging good then, yes, sir.

Q. She swung about 4 points on the day of the "Beaver"—"Selje" collision, did she not?

A. Around in that neighborhood, yes, sir.

Q. I want you to describe the conditions of her swinging on the day of the "Beaver"—"Selje" collision; you remember the speed you were going at, do you not? A. Yes, sir.

Q. 77 revolutions, was it not?

A. Do I have to answer these questions? [324]

Q. Oh, yes.

A. That has nothing to do with this.

Mr. CAMPBELL.—Mr. Ettershank, you answer every question you are asked by counsel; the Court will tell you and will tell us when a question is not to be answered.

Mr. DENMAN.—Q. You were making 77 revolutions on that day, were you not?

A. Something like that, sir.

Q. And you were running about a little over a minute before you struck the "Selje," were you not?

A. Yes, sir.

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